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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 436

Supreme Court, U.S.
FILED
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E. ROBERT SEAVER, CLERK

BIRDIE MAE DAVIS, et al.,
Petitioners,

v.

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, et al.

On Writ of Certiorari to the United States Court of Appeals
for the Fifth Circuit

BRIEF

For the Board of School Commissioners of Mobile County

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On Writ of Certiorari to the United States Court of Appeals
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BRIEF

**For the Board of School Commissioners
of Mobile County**

"For almost a decade there have been judicial efforts to desegregate the schools of Mobile County, Alabama. We wonder when the epilogue will be written." . . . (Judge Goldberg, Opinion in Fifth Circuit number 27849, a collateral proceeding to the primary desegregation case.)

"I have said many times that the best thing that could happen would be for this litigation to come to an end. This is true. But I am unwilling to disregard all common sense and all thoughts of sound education, simply to achieve racial balance in all schools. I do not believe the law requires it. And this litigation will continue to be stirred as long as adequate funds are provided for those who want litigation for the sake of litigation, without regard to the rights of the children and parents involved. The Court has attempted as nearly as possible to comply with the mandate of the Appellate Courts and yet leave it humanly and educationally possible to operate the schools." . . . (Judge Daniel H. Thomas' Opinion attached as part of the January 31, 1970, District Court decree in this case.)

OPINIONS BELOW

The statement of opinions and orders of the courts below made by Petitioner does not include the following orders and opinions, which should be included:

1. Order of the district court filed January 22, 1970, granting the application for intervention of the Mobile County Council Parent-Teachers Associations, et al, unreported.

2. Order of the district court filed January 31, 1970 requiring the re-establishment of an elementary school on Dauphin Island, unreported.

3. Order of the district court filed August 12, 1970 requiring the pairing of Hamilton and Robbins schools, unreported.

4. Order of the district court filed August 12, 1970 appointing the bi-racial advisory committee, unreported.

QUESTIONS PRESENTED

In our brief for the Respondent responding to the petition for writ of certiorari, we opposed the granting of the writ as being unnecessary; consequently we made no specification of questions presented for review, other than with regard to the prayer for relief, pendente lite. We restate that specification here:

I. Under the immediate facts present in this case, should this school system, which is totally integrated and unitary in every respect (except for the existence, as the result of voluntary residential patterns, of two (2) schools with an all negro student body and five (5) schools with an all white student body, out of a total of eighty three (83) schools in the system), be subjected to another complete reorganization; by the summary adoption by this Court of another desegregation plan (Plan B-I Alternative, urged by Petitioner, pendente lite) that has been rejected by the District Court and the Court of Appeals as educationally unsound and functionally impossible of implementation, and comes to this Court completely unsupported by testimony in any form; to replace the present desegregation plan which was devised by the District Court and United States Department of Justice and the Office of Education of the Department of Health, Education and Welfare, and approved and adopted by the Fifth Circuit Court of Appeals.

* * * * * * * *

Now that the writ has been granted, Respondent is not entirely satisfied that the statement of questions presented for review now made by Petitioner in its present brief adequately presents all of the essential questions fairly raised by this case and now at issue before this Honorable Court. Accordingly, respondent respectfully makes this further specification of questions presented.

II. Does the Constitution of the United States require that the public school systems of the United States assign the teachers of the systems to the schools of the systems in such a manner as to achieve a racial balance of teachers in each school, or some other arbitrary mathematical ratio of black and white teachers in the schools of the system.

III. Does the Constitution of the United States require that the public school systems of the United States assign the students of the systems to the schools of the systems in such a manner as to achieve a racial balance of students or some arbitrary mathematical ratio of black and white students in the schools of the system.

A. Does the mere existence of a school with a student body made up of students all of one race, in a public school system that is otherwise completely integrated and unitary, render the school system constitutionally deficient:

(1) If the student body of such school is all black; or,

(2) If the student body of such school is all white?

B. Does the existence of two (2) schools that have all black student bodies and five (5) schools that have all white student bodies, in a school system of eighty-three (83) schools that is otherwise completely integrated and unitary, render the school system constitutionally deficient?

IV. Under the Constitution of the United States, do white public school students have the same right or an equal right as do black public school students, to the benefit and protection of the Constitution and of the laws of the United States; specifically the Equal Protection Clause of the Fourteenth Amendment, and the Civil Rights Act of 1964. If they do, then is it not Constitutionally sufficient that public school systems assign students to

schools on the basis of attendance zones that are fairly drawn to normal standards of educational soundness and upon the basis of non-racial criteria, in order to produce as nearly as possible a system of unitary neighborhood schools.

STATEMENT

I. General Introductory Information

The Mobile County Public School System is the largest school system in the State of Alabama, with a normal annual enrollment of approximately 79,000 students. The enrollment has steadily decreased since 1965 as a result of public dissatisfaction and other problems associated with the desegregation process. During the past school year (1969-70) total enrollment was 73,504, and this year total enrollment on September 14, 1970, the fourth day of school (the time that enrollment figures are normally recorded) is only 68,623; a further loss of almost 5000 students.

The school system is administered by a board of five commissioners elected from the county at large by popular vote in county wide elections. They serve without compensation. The board in turn employs professional administrative personnel, including a superintendent of schools who has a Ph. D. Degree from Columbia University. The system is a combined city-county system encompassing the entire county, which is largely rural, and every city and municipality in the county, the largest of which is the City of Mobile with a population of some 235,000 persons. Thus the School Board must deal with the whole spectrum of problems and difficulties inherent in the desegregation process, from those peculiar to small rural schools and systems, to those associated with affluent

suburban systems, to those found in large, compact metropolitan or urban systems.

During the past school year (1969-70) the School Board operated 89 schools and employed 2605 teachers; fifty nine per cent (59%) of these teachers were white and forty one per cent (41%) black. Student enrollment in the system is normally about sixty per cent (60%) white and forty per cent (40%) black.*[1]

II. Statement of the Facts

This case has been in litigation since 1963. At that time the school system was, in both a legal and a practical sense, a dual system, with blacks attending one set of schools and whites attending another. There was no student integration, no faculty integration and no integration of services, facilities, activities and programs. This once dual system has now been completely disestablished, and there now exists a unitary school system within which no person is effectively excluded from any school because of race or color; as per **Alexander v. Holmes County Board of Education,** 396 U.S. 19 (1969). The system is unitary in every aspect of its operation.

The course of the desegregation process from 1963 to the present is reflected in capsule form by the following statistical table:

---

*[1] The ratio was somewhat different during the 1969-70 school year owing to the disappearance of approximately 6,500 white students from the system, apparently as a result of their dissatisfaction with the School Board's implementation of the desegregation plans devised by the District Court and promulgated in its August 1, 1969 and January 31, 1970 Decrees. This year (1970-71) the disparity is even greater due to the loss of still more white students from the system.

	1962-63	1963-64	1964-65	1965-66	1966-67	1967-68	1968-69	1969-70	1970-71
Total number of schools	89	93	95	97	98	96	91	89	83
Total number of schools with a bi-racial student body	0	1	3	10	15	34	57	68	76
Total number of schools with biracial faculty	0	0	0	0	0	10	89	88 *1	82 *1
Total number of students enrolled in the system	73949	76615	78652	77887	77101	76090	75464	73504	68623
Total number of students enrolled in biracial schools	0	3056	4004	10474	15636	28558	47560	55314	64306

*1 The one school without bi-racial faculty is Dauphin Island School, a one teacher school on an island in the Gulf of Mexico.

The following statistical table illustrates the extent of faculty and student body integration in every school in the system based upon the desegregation plan placed into implementation upon the opening of school on September 9, 1970. This table also indicates the racial character of each school in the era of the dual school system, prior to the start of the desegregation process; and it indicates the racial make up of the administrative staff (principal and assistant principals) of each school.

NAME OF SCHOOL	RACIAL CHARACTER OF SCHOOL IN DUAL SYSTEM ERA	CURRENT (1970-71) RACIAL CHARACTER OF STUDENT BODY *6	1970-71 STUDENTS ASSIGNED B	1970-71 STUDENTS ASSIGNED W	1970-71 FACULTY ASSIGNED *5 B	1970-71 FACULTY ASSIGNED *5 W	1970-71 ADMINISTRATORS ASSIGNED B	1970-71 ADMINISTRATORS ASSIGNED W
ADAMS (CLEVELAND)	B	Bi-racial	293	687	16	25	1	1
ALBA	W	Bi-racial	179	1463	25(1)	38(1)		2
ARLINGTON	W	Closed						
AUSTIN	W	Bi-racial	14	384	5	7		1
AZALEA ROAD	W	Bi-racial	35	999	14(2)	24		2
BAKER	W	Bi-racial	94	984	14(3)	26		2
BARNEY (CHICKASAW TERRACE)	B	Closed						
BARTON	W	Closed						
BELSAW (MT.VERNON ELEMENTARY)	B	Bi-racial	209	26	4	3(4)	1	

NAME OF SCHOOL	RACIAL CHARACTER OF SCHOOL IN DUAL SYSTEM ERA	CURRENT (1970-71) RACIAL CHARACTER OF STUDENT BODY *6	1970-71 STUDENTS ASSIGNED B	W	1970-71 FACULTY ASSIGNED *5 B	W	1970-71 ADMINISTRATORS ASSIGNED B	W
BIENVILLE	W	Bi-racial*1						
BLOUNT	B	Bi-racial	1233	1041	36	41(12)	2	1
BRAZIER		B	1006		14	17(3)	1	
BROOKLEY	W	Bi-racial	71	490	7	10(1)		1
BURROUGHS	B	Bi-racial	242	188	6	9(1)	1	
CALCEDEAVER	W	Bi-racial*2		168	2	4½		1
CALDWELL	B	Bi-racial	307	11	6(½)	3½(6½)	1	
CALVERT	W	Closed						
CARVER	B	Bi-racial*3						
CENTRAL	B	Bi-racial	1563	231	24	27(8)	2	
CHICKASAW	W	Bi-racial	75	448	6	8(2)		1
CITRONELLE	W	Bi-racial	367	738	19(2)	31		2
CLARK	W	Bi-racial	903	687	23(1)	34(2)		2
COTTAGE HILL	B	Closed						
COUNCIL	B	Bi-racial	404	50	6(1)	8	1	
CRAIGHEAD	W	Bi-racial	516	242	11	16(1)	1	
CRICHTON	W	Bi-racial	144	352	7½	11(1)		1
DAUPHIN ISLAND	W	W*4		20		1*4		1
DAVIDSON	W	Bi-racial	78	2562	37(8)	66(2)		3
DAVIS		Bi-racial	176	613	9(1)	16		1
DAWES UNION	B	Closed						

NAME OF SCHOOL	RACIAL CHARACTER OF SCHOOL IN DUAL SYSTEM ERA	CURRENT (1970-71) RACIAL CHARACTER OF STUDENT BODY *6	1970-71 STUDENTS ASSIGNED B	W	1970-71 FACULTY ASSIGNED *5 B	W	1970-71 ADMINISTRATORS ASSIGNED B	W
DICKSON	W	Bi-racial	155	579	9	14		1
DIXON	B	Bi-racial	181	239	5	6(2)	1	
DODGE		Bi-racial	62	670	10	14		1
DUNBAR	B	Bi-racial	940	86	14	13(9)		2
EANES	W	Bi-racial	181	823	13(3)	23		2
EIGHT MILE	W	Bi-racial	103	556	9(1)	15		1
ELLICOTT	W	Closed						
EMERSON	B	Closed						
EVANS	W	Bi-racial	118	91	8	8		1
FONDE	W	Bi-racial	8	662	8	13		1
FONVILLE	B	Bi-racial	866	15	13	9(11)	1	
FOREST HILL	W	W		519	6	10		1
GLENDALE	W	Bi-racial	574	257	10	14(2)		1
GORGAS	W	Closed						
GRAND BAY		Bi-racial	152	667	9(1)	15(1)		1
GRANT	B	Bi-racial	1077	7	16	9(15)	1	
GRIGGS	W	Bi-racial	40	899	11	17		1
HALL	B	Bi-racial	852	190	18	23(4)	1	1
HAMILTON	W	Bi-racial	204	414	7	11		1
HILLSDALE	B	Bi-racial	228	493	12	17(1)	1	1
HOLLINGER'S ISLAND	W	Bi-racial	4	391	5	7		1
HOWARD (NORTHSIDE)	B	Closed						

NAME OF SCHOOL	RACIAL CHARACTER OF SCHOOL IN DUAL SYSTEM ERA	CURRENT (1970-71) RACIAL CHARACTER OF STUDENT BODY*6	1970-71 STUDENTS ASSIGNED B	W	1970-71 FACULTY ASIGNED *5 B	W	1970-71 ADMINISTRATORS ASSIGNED B	W
INDIAN SPRINGS		Bi-racial	11	507	6	9		1
LEE	W	Bi-racial	159	641	10	16		1
LEINKAUF	W	Bi-racial	252	194	6	8		1
LOTT	B	Bi-racial	132	413	8	11	1	
MARYVALE	W	Bi-racial	207	395	8	12		1
MERTZ	W	W		373	4	7		1
MOBILE COUNTY HIGH	W	Bi-racial	259	624	13(1)	22		2
MOBILE COUNTY TRAINING	B	Bi-racial	699	202	14	8(12)	2	
MON LOUIS ISLAND	W	Closed						
MONTGOMERY		Bi-racial	30	815	10(6)	24		2
MORNINGSIDE	W	W		674	8	11(1)		1
MOUNT VERNON	W	Bi-racial	318	80	5	4½(3)		1
MURPHY	W	Bi-racial	1546	1054	31(7)	58		3
OAKDALE	W	Closed						
OLD SHELL	W	Bi-racial	357	117	5	6(1)		1
ORCHARD	W	Bi-racial	113	758	10	15		1
OWENS	B	B	1479		20	13(17)	1	
PALMER (SNUG HARBOR)	W	Bi-racial	493	104	10	5(9)	1	

NAME OF SCHOOL	RACIAL CHARACTER OF SCHOOL IN DUAL SYSTEM ERA	CURRENT (1970-71) RACIAL CHARACTER OF STUDENT BODY *6	1970-71 STUDENTS ASSIGNED B	W	1970-71 FACULTY ASSIGNED *5 B	W	1970-71 ADMINISTRATORS ASSIGNED B	W
PHILLIPS	W	Bi-racial	820	364	18(1)	28	1	
PRICHARD	W	Bi-racial	566	187	12(1)	19	1	1
RAIN	W	Bi-racial	111	1155	23	35		2
ROBBINS		Bi-racial	702	129	9(1)	12(2)	1	
RUSSELL	W	Closed						
ST. ELMO	B	Bi-racial	49	426	8	11(2)	1	1
SARALAND	W	Bi-racial	35	759	9	13		1
SATSUMA	W	Bi-racial	198	919	17(3)	30(1)		2
SCARBOROUGH		Bi-racial	11	773	13	19(1)		2
SEMMES	W	Bi-racial	23	989	13(2)	23		2
SHAW		Bi-racial	228	1293	21(4)	38		2
SHEPARD	W	Bi-racial	26	418	4(2)	8		1
SOUTHSIDE	B	Closed						
STANTON ROAD	B	Bi-racial	894	4	13	17(2)	1	
TANNER WILLIAMS	W	Bi-racial	9	345	3(2)	7		1
THEODORE	W	Bi-racial	339	1516	25(6)	47		2
THOMAS	B	Bi-racial	74	160	3½	5		1
THOMPSON	B	Closed						
TOULMINVILLE	W	Bi-racial	454	247	12	14(3)	2	
TRINITY GARDENS	B	Bi-racial	969	171	15	17(6)	2	
TURNERVILLE	W	Closed						

NAME OF SCHOOL	RACIAL CHARACTER OF SCHOOL IN DUAL SYSTEM ERA	CURRENT (1970-71) RACIAL CHARACTER OF STUDENT BODY *6	1970-71 STUDENTS ASSIGNED B	W	1970-71 FACULTY ASSIGNED *5 B	W	1970-71 ADMINISTRATORS ASSIGNED B	W
VIGOR	W	Bi-racial	1385	930	36(6)	60(3)	1	2
WARREN	B	Closed						
WASHINGTON	B	Bi-racial	780	636	14	11(11)	2	
WESTLAWN	W	W		322	4(1)	7		1
WHISTLER	W	Bi-racial	160	227	6(1)	11		1
WHITLEY	B	Bi-racial	345	127	6	7(3)	1	
WILL		Bi-racial	160	652	7(2)	13		1
WILLIAMS	W	Bi-racial	41	533	8	11		1
WILLIAMSON	B	Bi-racial	570	594	18	25(2)	1	1
WILMER	W	Bi-racial	54	349	4	9		1
WOODCOCK	W	Bi-racial	97	145	5(2)	10½		1

*1 By Court order Bienville has become a part of the Vigor High School Complex, which has an assigned enrollment of 1385 black, 985 white.

*2 Calcedeaver is attended entirely by a community of persons of entirely mixed bloodlines and is therefore considered bi-racial.

*3 By Court order Carver has become a part of the Blount High School Complex, which has an assigned enrollment of 1233 black, 1041 white.

*4 As will be noted, this is a small one teacher school,isolated on an island in the Gulf of Mexico.

*5 The figures in parenthesis indicate the number of vacancies, by race, yet to be filled in order to reach the 60/40 ratio.

*6 Note that although there are five schools with all white student bodies, every school has a bi-racial faculty, except Dauphin Island School, a one teacher school on an island in the Gulf of Mexico.

In recent decisions the Courts have set out the various elements that must be taken into account in determining if a school system has been converted from a dual system to a unitary, nonracial system—faculty and staff; transportation; extra curricular activities, including sports; facilities; school construction, consolidation and site selection; transfer policy; and student body composition.*[2] The Petition For Writ of Certiorari, and now Petitioners' Brief upon the Writ, directly concern themselves only with student body composition. Nevertheless, since this is only one element of the total desegregation process, it is desirable that some attention also be directed toward an examination of all of the elements of the conversion from dual to unitary school system, as they exist in the Mobile County Public School System.

(1) Faculty and Staff

The School Board has conducted a positive and affirmative program to achieve complete desegregation of faculty. This has been accomplished in many instances by disregarding the Alabama Tenure Laws, as required by the Court; and regrettably, often at the expense of sound educational practice.

The extent of faculty integration has increased sharply each year since August, 1966 when the Court first instructed the School Board to begin faculty desegregation. During the 1967-68 school year, only fifteen teachers taught across racial lines. At the conclusion of the 1968-69 school year all but three of the then ninety-one schools of the system had integrated faculties.*[3]

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*[2] **Singleton v. Jackson Municipal Separate School District,** 419 F.2d 1211 (5th Circuit, en banc, December 1969); and **Ellis v. Board of Public Instruction of Orange County,** 423 F.2d 203. (5th Circuit, 1970)

*[3] Findings of Fact, October 13, 1967, paragraph 23; and Faculty Report to the District Court, December 3, 1968 respectively.

Throughout the 1969-70 school year every school in the system had an integrated faculty, and over 20% of the 2605 teachers in the system were teaching across racial lines in schools where the race of a majority of the student body was opposite their own. This includes both black teachers in predominantly white schools, as well as white teachers in predominantly black schools.*4

As a result of implementation of the judgments and orders of the District Court and the Court of Appeals now before this court for review, assignments of faculty for the 1970-71 school year have been made in a conscientious effort to achieve a 60% white, 40% black, faculty in every school, as required by the Court; 60/40 being the approximate ratio of white and black teachers employed in the system as a whole. The following statistical table reflects actual assignments as they now exist (as of September 15, 1970). The figure in parenthesis indicates the number of vacancies to be filled, by race. Further adjustments to reach the exact ratio set by the court are being made and will continue until the task is accomplished.

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*4 Findings of Fact, April 14, 1970, Attachment E . . . and . . . Report to the District Court dated November 26, 1969, filed at the direction of the Court. . . . Every school except Dauphin Island, a one teacher school on an island in the Gulf of Mexico, reopened by Court order on January 31, 1970.

NAME OF SCHOOL	1970-71 FACULTY ASSIGNED B	W
ADAMS (CLEVELAND)	16	25
AUSTIN	5	7
BAKER	14(3)	26
BIENVILLE *1		
BRAZIER	14	17(3)
BURROUGHS	6	9(1)
CALDWELL	6(½)	3½(6½)
CENTRAL	24	27(8)
CITRONELLE	19(2)	31
COUNCIL	6(1)	8
CRICHTON	7½	11(1)
DAVIDSON	37(8)	66(2)
DICKSON	9	14
DODGE	10	14
EANES	13(3)	23
EVANS	8	8
FONVILLE	13	9(11)
GLENDALE	10	14(2)
GRANT	16	9(15)
HALL	18	23(4)
HILLSDALE	12	17(1)
INDIAN SPRINGS	6	9
LEINKAUF	6	8

NAME OF SCHOOL	1970-71 FACULTY ASSIGNED B	W
ALBA	25(1)	38(1)
AZALEA ROAD	14(2)	24
BELSAW (MT. VERNON ELEMENTARY)	4	3(4)
BLOUNT	36	41(12)
BROOKLEY	7	10(1)
CALCEDEAVER	2	4½
CARVER *2		
CHICKASAW	6	8(2)
CLARK	23(1)	34(2)
CRAIGHEAD	11	16(1)
DAUPHIN ISLAND		1 *3
DAVIS	9(1)	16
DIXON	5	6(2)
DUNBAR	14	13(9)
EIGHT MILE	9(1)	15
FONDE	8	13
FOREST HILL	6	10
GRAND BAY	9(1)	15(1)
GRIGGS	11	17
HAMILTON	7	11
HOLLINGER'S ISLAND	5	7
LEE	10	16
LOTT	8	11

NAME OF SCHOOL	1970-71 FACULTY ASSIGNED B	W
MARYVALE	8	12
MOBILE COUNTY HIGH	13(1)	22
MONTGOMERY	10(6)	24
MOUNT VERNON	5	4½(3)
OLD SHELL	5	6(1)
OWENS	20	13(17)
PHILLIPS	18(1)	28
RAIN	23	35
ST. ELMO	8	11(2)
SATSUMA	17(3)	30(1)
SEMMES	13(2)	23
SHEPARD	4(2)	8
TANNER WILLIAMS	3(2)	7
THOMAS	3½	5
TRINITY GARDENS	15	17(6)
WASHINGTON	14	11(11)
WHISTLER	6(1)	11
WILL	7(2)	13
WILLIAMSON	18	25(2)
WOODCOCK	5(2)	10½
MERTZ	4	7
MOBILE COUNTY TRAINING	14	8(12)
MORNINGSIDE	8	11(1)
MURPHY	31(7)	58
ORCHARD	10	15
PALMER (SNUG HARBOR)	10	5(9)
PRICHARD	12(1)	19
ROBBINS	9(1)	12(2)
SARALAND	9	13
SCARBOROUGH	13	19(1)
SHAW	21(4)	38
STANTON ROAD	13	17(2)
THEODORE	25(6)	47
TOULMINVILLE	12	14(3)
VIGOR	36(6)	60(3)
WESTLAWN	4(1)	7
WHITLEY	6	7(3)
WILLIAMS	8	11
WILMER	4	9

*1 By Court order Bienville has become a part of the Vigor High School Complex, which has an assigned enrollment of 1385 black, 985 white.

*2 By Court order Carver has become a part of the Blount High School Complex, which has an assigned enrollment of 1233 black, 1041 white.

*3 As will be noted, this is a small one teacher school, isolated on an island in the Gulf of Mexico.

Your attention is directed to the statistical table on preceding pages of this brief (page 7) for a detailed presentation of the substantial number of black principals in charge of predominantly white faculties and white student bodies, and the substantial number of white principals in charge of predominantly black faculties and black student bodies.

(2) Transportation

Mobile is a combined city-county school system with many rural schools. Thus in the traditional manner of rural school systems, there are a substantial number of school busses operated by the School Board to transport students in the rural areas of the county to these rural schools. A few busses are also used to provide transportation for a small number of students residing in remote outlying areas within the city limits.

At one time, during the era of the dual school system, the Board did in fact operate a dual transportation system with overlapping bus routes, utilizing transportation to preserve the dual system. This is no longer the case. Schools in that part of the system where transportation is provided, serve specific geographic attendance zones drawn by the District Court, and approved by the Court of Appeals, sitting en banc, **Singleton v. Jackson**, 419 F. 2d 1211; every zone is bi-racial and every school is integrated. School busses are routed in such a manner as to transport all students in each attendance zone to the school serving the zone. These routes are drawn without regard to race; they do not overlap; each bus picks up and transports every student on its route regardless of the race of the student; students are not segregated within the busses; and the same quality and extent of service is provided in all areas of the county without reference to

the race of the students living in the area. The transportation system is thus operated on a non-segregated and non-discriminatory basis in every respect.*5 This is entirely conceded by Petitioner in its brief (page 6) where petitioner states: "Since September 1969, the rural portion of the system . . . (which is entirely dependent upon transportation) . . . has been desegregated adequately".

(3) Extra Curricular Activities, Including Sports

All extra curricular activities, including sports, over which the School Board has control are being operated on a non-segregated basis throughout the system, and have been for several years.*6

All athletic teams at every school are open to every student regardless of race. Participation by minority race students, particularly by black students at traditionally white schools, has been substantial. For example, during the 1969-70 school year several predominantly white high schools fielded bi-racial basketball teams with more black players than white. There is also cross-scheduling between traditionally black schools and traditionally white schools in all major sports, in regular season play, and all tournament and play-off competitions are conducted on an integrated basis with traditionally white and traditionally black schools in competition against each other.*7

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*5 Findings of Fact, April 14, 1970, pages 9-10, page 3 and Attachment A.

*6 Findings of Fact, October 13, 1967, paragraph 22 . . . and Findings of Fact, April 14, 1970, pages 14-15.

*7 Findings of Fact, April 14, 1970, pages 14-15.

The same situation pertains to all other extra curricular activities over which the School Board has control, such as bands and other musical groups, ROTC units, speech and other academically related competitions, clubs and organizations, school related social events, parent related activities such as Parent Teacher Associations, and spectator events.*8

(4) Services, Facilities and Programs

There is no separation of students within the individual schools by race, by sex (except for physical education and gender related courses such as home economics), by class, by tracts or on any basis, other than the normal division of students into grade level and courses of study, which divisions have no racial basis.*9

All facilities are made available to all schools in the system without regard to the present or past racial composition of the schools. Within each individual school of the system all facilities are made available to all students on an equal basis, regardless of race. This includes not only facilities in the strict sense such as restrooms, lunchrooms, classrooms, laboratories, gymnasiums, libraries, playing fields and the like; but also, all services, activities and programs such as bands, orchestras, choral groups, clubs, counseling services, student governments, honor societies, publications staffs, intramural sports, assemblies, class elections and honors, parties and social events; and every other facility, activity and program of every school. This has been the situation for several years.*10

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*8 Findings of Fact, April 14, 1970, page 15.

*9 Findings of Fact, April 14, 1970, page 16.

*10 Findings of Fact, October 13, 1967, paragraph 22 . . . and . . . Findings of Fact, April 14, 1970, pages 16-18.

All schools are treated equally without reference to the past or present racial composition of the school, with regard to the allocation of instructional materials, facilities, equipment, furnishings, supplies, textbooks, allocated funds and every other item provided to or for schools of the system; and courses of instruction are offered without regard to race. This also has been the situation for several years.*11

Not only are all facilities, services, activities, and programs available to every student without regard to race, and operated on a non-segregated, non-discriminatory basis, but actual participation by minority race students is substantial*12

(5) School Construction, Consolidation and Site Selection

The fault of the School Board is that for many years it followed the unusual practice of building schools where the children are. Now, the construction of or addition to any school, and the selection of any school site, must have the prior approval of the Court. This has been a part of the Mobile desegregation plan since 1968.

The School Board is genuinely perplexed and uncertain as to what shifting standard may next apply, or from time to time apply, with regard to school construction plans and programs. The Board has already suffered substantial financial loss as a consequence of land acquisition and other construction preparations made with District Court approval, later reversed and erased by the Court

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*11 Findings of Fact, October 13, 1967, paragraph 28 . . . and . . . Findings of Fact, April 14, 1970, page 17.

*12 Findings of Fact, April 14, 1970, pages 17-18 . . . and . . . Report to the Court, February 24, 1970.

of Appeals.*13 As a result the School Board's building program has been at a total standstill for three years. No schools have been constructed and no school sites selected during this time.

The last schools constructed in the system were Dodge and Adams in 1967 and Grand Bay in early 1968. Dodge and Adams opened their doors for the first time in September 1967, both as fully integrated schools. The current assigned enrollment at Dodge is 62 black and 670 white. The current assigned enrollment at Adams, which first opened its doors as a predominantly black school, is 293 black and 687 white. Grand Bay first opened in September 1968. The current assigned enrollment at Grand Bay is 152 black and 667 white.*14

Regarding school consolidation, there have been a number of consolidations, some proposed voluntarily by the School Board and some required by the District Court, within the past three years. Each has resulted in a significant increase in the extent of integration in the system. Some of the more significant consolidations are:*15

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*13 Orders of the District Court dated December 20, 1968 and March 14, 1969 approving the Board's construction plans for a new building at Howard Elementary School and an additional building at Toulminville High School were reversed by the Court of Appeals on June 3, 1969. As a result the School Board has suffered a financial loss of approximately a half million dollars (Brief of Appellees in Court of Appeals number 27,260 and 27,491, pages 6, 13 and 38, also from the transcript of testimony in those cases, Tr. pages 13-16, 29 and 124). Howard has now been abandoned because of its substandard facilities. Toulminville continues to operate with an assigned student body of 454 black and 247 white.

*14 Findings of Fact, April 14, 1970, page 19, and Attachment A, . . . and . . . Statistical table attached to the Court of Appeals opinion of August 4, 1970.

*15 Findings of Fact, April 14, 1970, pages 10-22. All figures are shown as of the time the consolidation occurred.

1. Closing of the all black Emerson Elementary school and distribution of its students to two adjacent schools, one of which had been traditionally black (Council) and one traditionally white (Leinkauf), producing an enrollment at Leinkauf of 224 white and 235 black.

2. Closing of the all black Robert Thompson School and consolidation of its students into the theretofore all white Wilmer School.

3. Closing of the all black Cottage Hill Elementary School and the distribution of its students to the theretofore all white Fonde, Shepard and Dodge Elementary Schools.

4. Consolidation of the all white Citronelle and all black Rosa Lott Schools, resulting in the following enrollments: Citronelle, 800 white and 400 black; Rosa Lott, 465 white and 145 black.

5. Conversion of the all white Augusta Evans School to a school for special students with an enrollment of 54 white and 87 black, and a faculty of 8 black and 8 white.

6. Closing of the traditionally white Arlington Elementary School and the distribution of its students to surrounding schools, some of which are predominantly white, and some of which are predominantly black.

7. Closing of the all black Warren Elementary School and the distribution of its students to the traditionally white Crichton Elementary School and other schools, predominantly black, producing an enrollment at Crichton of 457 white and 240 black.

8. Closing of the all black Barney School resulting in the distribution of its students to surrounding schools, some predominantly white and some predominantly black.

9. Consolidation of the all black Belsaw and the all white Mount Vernon schools, resulting in integration of both schools.

10. Consolidation of the all black St. Elmo and all white Theodore Schools, resulting in the following enrollments: St. Elmo 436 white, 54 black; Theodore 1466 white and 335 black.

11. Consolidation of the all black Burroughs, all black Dixon and all black Dawes Union Schools with the all white Griggs and all white Davis Schools resulting in:

(a) Closing of the all black Dawes Union School

(b) Integration of the other four schools producing the following enrollments:

Burroughs .....192 white, 290 black;
Griggs .....865 white, 41 black;
Davis .....591 white, 178 black;
Dixon .....249 white, 189 black.

12. Closing of the all black Howard School and the absorbtion of its students into Old Shell Road School, a traditionally white school.

As do most large school systems in cities undergoing large scale population shifts as a result of Federally sponsored urban development programs and other factors, the Mobile Public School System has found it necessary to resort to the use of portable classroom units that can be moved from one permanent school facility to another. Some schools have adequate basic facilities (land area, lunchroom, library, physical education, special facilities) to accommodate a number of portable classrooms; some do not. Within this basic limitation, the Board follows a policy of locating portable classrooms solely on the basis of and for the purpose of providing the facilities neces-

sary to accommodate the students assigned to the various schools by the terms of the various orders of the Court itself.*16

(6) Transfer Policy

The entire transfer policy now in use, including a majority to minority transfer provision, was formulated by the court itself. This policy is operated in accordance with provision prescribed by the court and is applied uniformly throughout the system.*17 The transfer policy is attached to this brief, as APPENDIX I.

(7) Bi-Racial Committee

The District Court, upon the suggestion of the Court of Appeals, has appointed a bi-racial committee to advise and assist the School Board and the Court in the operation of the Court ordered desegregation plan and the maintenance of a unitary school system. The committee, appointed by the District Court on August 12, 1970, has ten members, five black and five white. *18 The committee became active immediately and has begun to make its presence felt.

(8) Student Assignment

The total desegregation plan for the whole system, now in full implementation, assigns every student in the system to a school on the basis of a **unitary system of geographic attendance zones**, drawn by the District Court, the Court of Appeals, the U. S. Department of Justice, and the Office of Education of the Department of Health, Education and

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*16 Findings of Fact, April 14, 1970, page 22.

*17 Findings of Fact, April 14, 1970, page 23.

*18 At the request of Petitioner, the Court has now appointed four more members to the committee, two black and two white.

Welfare. In addition to this, in three instances, two adjacent elementary school zones have been paired; Council-Leinkauf, Palmer-Glendale and Hamilton-Robbins. This has produced the assigned enrollments for the 1970-71 school year set out in the statistical table in a previous section of this brief (page 7).

III. The Desegregation Process—Chronologically

At the outset of this litigation the Board of School Commissioners of Mobile County committed themselves to compliance with the constitutional mandate of the Fourteenth Amendment of the United States Constitution, as originally stated by this Honorable Court in **Brown v. Board of Education of Topeka**, 347 U.S. 483, that the opportunity for education is:

> "a right which must be made available to all on equal terms."

Full comprehension of the obligations of school systems with reference to the legal principles arising out of **Brown**, and the constitutional principles interpreted by **Brown**, has not always been easy for this School Board; as it has not been easy for school boards and courts throughout the nation. (Compare: **Brown**; **Briggs v. Elliott**, 132 F. Supp. 776, **United States v. Jefferson County Board of Education**, 372 F.2d 836, 380 F.2d 385, cert. denied 389 U.S. 840; **Green v. County School Board of New Kent County, Virginia**, 391 U.S. 430; **Alexander v. Holmes County Board of Education**, 396 U.S. 19; **Avery v. Wichita Falls Independent School District**, 241 F.2d 230; **Borders v. Rippy**, 247 F.2d 268; **Boson v. Rippy**, 285 F.2d 43; **Ellis v. Board of Public Instruction of Orange County**, 423 F.2d 203; **Kemp v. Beasley**, 423 F.2d 851 (C.A. 8th, 1970); **Deal v. Cincinnati**, 324 F.2d 209; and **Deal v. Cincinnati**, 419 F.2d 1387). Indeed, it has often been an impossible task for a school

board to determine not only what its current obligation may be, but to predict or anticipate what shifting standard may next apply.

It is against this background that school boards have had to proceed with the business of educating children on the one hand, while pursuing an illusive judicial phantom on the other; and the two have not always been totally compatible. For not being able to anticipate in advance or immediately adjust over-night to each new standard, for not being able to accomplish in fact, that which a court can accomplish on paper with a stroke of the pen, school boards throughout the country, this one included, have been labeled racist, lawless, uncooperative, contemptuous and recalcitrant. Realistic appraisal of the extent of integration in this school system, taken in the abstract or in comparison to the extent of integration in any and every other comparable school system in the nation, exposes the shallowness of such charges as sought to be applied to this school system.

In an earlier section of this brief (page 7) we have observed the progress of the desegregation process from a purely statistical standpoint. A chronological examination of the process from the judicial standpoint should now be helpful.

1962-1963

The Mobile County Public School System began the 1962-63 school year as a dual school system. Students were assigned to neighborhood schools on the basis of geographic attendance zones. The zones were drawn on a racial basis with overlapping zones for white and negro schools. The zones, both black and white, were drawn with strong reliance on sound educational principles, including: consideration for traffic and other safety hazards, distance, routes of travel and access, barriers such as rivers

and industrial complexes, and adherence to the basic neighborhood concept. Because of the dual zone aspect, this resulted in several split zones, (such as for the Warren School which is no longer in use, but was at that time all black), and the temporary transportation of some students in the city part of the system pending completion of construction of a school, (such as Hillsdale Heights School, built in the middle of a suburban black community to establish a dual zone in that area). *19

Suit was filed in March 1963 by a group of black parents and students seeking an injunction to require the School Board to begin desegregation of the school system.

1963-1964

As a result of action in the District Court and in the Court of Appeals the School Board was directed to begin the 1963-64 school year with desegregation of the system on a one grade a year stair-step plan.*20 The Board moved immediately to comply with the orders of the court, and did so in good faith throughout the 1963-64 school year.

1964-1965

On the basis of a motion for further relief, resulting in action in the District Court and the Court of Appeals, for the 1964-65 school year the Board was directed to speed up the stair-step desegregation plan by applying it to two grades per year rather than one and to abolish dual zones for each grade as it was reached in the stair-step progression.*21 Again, the School Board moved immediately to

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*19 The enrollment at Hillsdale is now 228 black, 493 white.

*20 **Davis v. Board of School Commissioners of Mobile County,** 318 F.2d 63; **Davis v. Board of School Commissioners of Mobile County,** 322 F.2d 356.

*21 **Davis v. Board of School Commissioners of Mobile County,** 333 F.2d 53.

comply with the order of the court, and did so in good faith throughout the 1964-65 school year.

At this point this School Board, as all others, was proceeding upon the understanding that its legal and constitutional obligation was defined by **Brown I**, supra, which stated that education is, "a right which must be made available to all on equal terms"; **Brown II** *22 which enunciated the doctrine of "all deliberate speed"; and subsequent cases construing **Brown I**, such as **Briggs v. Elliott**, supra, which stated, "It (Brown) has not decided that the states must mix persons of different races in the schools . . . The Constitution, in other words, does not require integration. It merely forbids discrimination"; and that the basic neighborhood school concept was not inconsistent with this obligation.

1965-1966

In response to the court's directive to do away with dual attendance zones the Board, in good faith, moved to comply, and undertook a redrawing of the zones. This effort did away entirely with dual zones and, while maintaining fidelity to the basic neighborhood school concept, produced a set of unitary zones. The 1965-66 school year began upon the basis of these unitary zones. The desegregation plan proposed by the board and approved by the court also contained, in deference to the strong feelings of both black and white citizens concerned with being caught in an inordinately difficult zone, a provision giving every student, black and white, the absolute right to attend the school of his zone or the nearest school formerly predominantly of his race, at his option. This was quite aptly named, the Option Plan.

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*22 **Brown v. Board of Education of Topeka**, 349 U.S. 294 (1955).

At this point this School Board, as most others, continued to seek in good faith to adjust itself in order to comply with its constitutional obligations, as they were defined and refined by the succession of cases following **Brown I and II**, supra, and **Briggs v. Elliott**, supra. Reference is had to the following cases, among others:

Avery v. Wichita Falls Independent School District, 241 F.2d 230, . . . "The Constitution as construed in the School Segregation Cases . . . forbids any state action requiring segregation of children in public schools solely on account of race; it does not however, require actual integration of the races."

Borders v. Rippy, 247 F.2d 268. . . . The equal protection and due process clauses of the fourteenth amendment do not affirmatively command integration, but they do forbid any state action requiring segregation on account of their race or color of children in the public schools."

Holland v. Board of Public Education, 258 F.2d 730. . . . The Fourteenth Amendment does not speak in positive terms to command integration, but negatively, to prohibit governmentally enforced segregation."

Boson v. Rippy, 285 F.2d 43,. . . . Negro children have no constitutional right to the attendance of white children with them in the public schools. Their constitutional right to 'the equal protection of the laws' is the right to stand equal before the laws of the State; that is, to be treated simply as individuals without regard to race or color."

1966-1967

On August 16, 1966, less than three weeks before the opening of school for the 1966-67 school year, the Court of Appeals reversed a decree of the District Court and required that the School Board's existing Option Plan be modified so as to provide for every student in the system

the blanket option of attending the school of his zone, or at his option the nearest black school **or the nearest white school.**[*23] Again, as in the past, the School Board moved immediately to amend the existing desegregation plan to incorporate this change required by the Court of Appeals, and implemented the same in good faith throughout the 1966-67 school year.

In addition, the Court of Appeals required the Board to: (1) add to its transfer policy the right to transfer in order to get a course of study not available at the school where a student is assigned; (2) speed up the stair-step application of the desegregation plan; (3) prepare to begin faculty desegregation.

The School Board also moved immediately to comply with these requirements. The stair-step application was immediately accelerated as specified; the subject matter transfer provision was immediately adopted, and remains a part of the transfer policy today; and preparations were made to commence faculty desegregation with the beginning of the next school year, including immediate initiation of inservice training of bi-racial teaching teams.

On its own, and without any suggestion or prompting from the court, the School Board began taking steps toward desegregation of its transportation system in the rural part of the school system, and desegregation of all services, facilities, programs, activities, and extra curricular activities, including sports.

1967-1968

In March, 1967, the United States Department of Justice was permitted by the District Court to intervene. In July, upon a motion for further relief, the District

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[*23] **Davis v. Board of School Commissioners of Mobile County, 364 F.2d 896.**

Court held an exhaustive evidentiary hearing over a period of several weeks between July 18 and August 18.*24 On October 13, 1967 the District Court entered a decree, accompanied by full Findings Of Fact and Conclusions Of Law.

In this Findings of Fact the District Court found:

(1) That there was no evidence of discrimination by race in the administration of the desegregation plan.

(2) That all services, facilities, activities and programs of the school system are available to every student and to every school in the system, without reference to race, including: restrooms, lunchrooms, special facilities and equipment, athletic teams, bands and choral programs, clubs and student groups, counseling, honor societies, dances and other social activities.

(3) That the defendant had formulated a specific plan for faculty desegregation, had commenced faculty desegregation, and had made sufficient and proper effort in the prevailing circumstances.

(4) That all staff and staff activities are integrated.

(5) That the Board had instituted remedial programs for the benefit of black students in the system, receiving the commendation of the Office of Education of HEW.

(6) That the Board had voluntarily undertaken several school consolidations, resulting in the closing of all black schools and the consolidation of the black students into schools that were either all white or predominantly white.

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*24 It is perhaps pertinent to observe here that although the litigation commenced in 1963 this was only the third evidentiary hearing. Petitioner complains long and loud in its brief over the lack of evidentiary hearings, and yet these complaints are all **after the fact**. The inescapable conclusion is that Petitioner is not so much concerned with **having** an evidentiary hearing as it is for being in position to complain over lack of such a hearing.

(7) That the Board was following a policy of constructing, renovating and maintaining schools without regard to race.

(8) That furnishings, fixtures, equipment, facilities, textbooks, supplies, allocated funds and courses of study are allotted to all schools without regard to race.

(9) That no complaint had been made to the Court by anyone as to discriminatory action of the board in administration of the desegregation plan.

There has been no subsequent finding to the contrary on any of these points.

In the meantime the 1967-68 school year commenced and the School Board, in good faith, implemented the desegregation plan prescribed by the courts, including several modifications prescribed by the district court as a result of the exhaustive evidentiary hearing.

1968-1969

On March 12, 1968 the Court of Appeals, relying heavily on the previous opinion of the court, en banc, in **United States v. Jefferson County Board of Education**, 372 F.2d 836 and 380 F.2d 385, entered an opinion in which it required the School Board to redraw its attendance zones in the urban or city portion of the system, saying:

> "The percentage of total students in bi-racial schools is superficially acceptable, but beneath the surface the picture is not good. . . . Having found the results of the present plan unsatisfactory, we turn to the difficult question of what should be done. . . . In this case, it will be necessary for the board to do the job again, this time making a survey of the type suggested by appellants. On the basis of information obtained from the survey, school officials will draw

attendance-zone lines on what they conceive to be a **nonracial basis.**"*25 (emphasis supplied)

In addition, the Court of Appeals also required: (1) elimination of the Option provisions of the plan; (2) further steps with regard to elimination of faculty; (3) a survey of the system and certain reports to the court; (4) the cross-scheduling of formerly white and formerly black schools in athletic competition; (5) certain restrictions on construction; (6) for the rural portion of the system, either a redrawing of zone lines, or the use of a freedom of choice plan of the type outlined in **Jefferson, supra.**

The Court of Appeals actually prescribed a specific decree for entry by the district court. It began by stating:

"As stated in the opinion of the Court of Appeals, the primary concern is that attendance-zone lines be drawn on a **nonracial** basis." (emphasis supplied) (*id.* at 696)

This decree was entered verbatim by the District Court on May 13, 1968. Once again, in good faith, the School Board moved promptly to carry out the directions of the court. The survey was made and filed with the court. The student assignment problem was carefully restudied and attendance zones were redrawn. The redrawn zones were filed with the court on May 7, 1968 even before the District Court had proceeded to enter the decree specified by the Court of Appeals. Two months later, in the face of mounting public hostility and pressure over dissatisfaction with the redrawn zones, the School Board asked the court to consider the possibility of placing the entire school system on a freedom of choice plan of student assignment.

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*25 **Davis v. Board of School Commissioners of Mobile County,** 393 F.2d 690 (693).

Commencing on July 17, 1968 the court held another full (6 days) evidentiary hearing, the second in as many years. During the course of the hearing both the Justice Department and the Petitioners presented to the court their own separate set of proposed zone lines for the urban portion of the system. As commented upon by the District Court in its decree, both of these plans provided for the continued existence of some all white and some all black schools.*[26]

Ultimately, the District Court rejected all three proposed zone plans (Board, Petitioner and Justice Department). It then entered a decree calling for the following plan of student assignment:

(1) In the **rural** part of the system—freedom of choice, as specifically provided by the Court of Appeals, and as specifically requested by the Justice Department.*[27]

(2) In the **urban** part of the system—freedom of choice in the high schools, and attendance zones for elementary junior high school, with the zones drawn by the court itself.

Referring to **Green v. County School Board of New Kent County, Virginia,** 391 U.S. 430, the court provided that the freedom of choice portion of its plan would operate only on an interim basis, to be continued, or not, from year to year dependent upon the speed of desegregation accomplished.*[28] This decree also provided for the closing of two all black schools and one all white school.

Once again, the School Board moved promptly to implement the Decree of the Court, and continued to imple-

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*[26] Decree of the District Court, July 29, 1968 (page 3).

*[27] Motion of the Justice Department filed on July 31, 1968, referred to by the Court in its Order of August 2, 1968 (page 4).

*[28] Decree of the District Court, July 29, 1968 (page 8).

ment the same in good faith throughout the 1968-69 school year. In the meantime, an appeal was taken.

During the course of the year the School Board also sought permission of the District Court to build a new elementary school building to replace a substandard building at the Howard Elementary School, and to add an additional building at Toulminville High School. After an evidentiary hearing permission was granted by the District Court. Subsequently on appeal the Court of Appeals reversed, concluding that the buildings would tend to perpetuate the dual system. Howard has now been abandoned; the assigned enrollment at Toulminville is 453 black, 247 white.

1969-1970

On June 3, 1969, on the appeal of the District Court order, the Court of Appeals switched horses in the middle of the stream and again reversed the District Court. Reversal was on the theory that the zone lines drawn by the district court should have been drawn on a **racial basis** rather than a **non-racial basis** as most recently ordered by the Court of Appeals, and that the statistical extent of desegregation in that portion of the system under freedom of choice was unacceptable, in view of **Green v. County School Board of New Kent County, Virginia**, supra.*[29]

The Court of Appeals remanded to the District Court and directed the court to request the Office of Education to collaborate with the School Board in the preparation of a revised plan of student assignment, providing: (1) that HEW and the Board should try to agree upon a revised plan; (2) that if HEW and the Board could not agree, HEW should file its own recommendations for a plan, (3) that all parties could then file objections and suggested

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*[29] **Davis v. Board of School Commissioners of Mobile County**, 414 F.2d 609.

amendments to the HEW recommendations; (4) that for plans as to which objections are made or amendments suggested or which in any event the district court will not approve without a hearing, the District Court should have a hearing, within ten days (5) that a new plan for the 1969-70 school year shall be approved by the District Court no later than August 1, 1969.

Pursuant to the June 3, 1969 opinion and mandate of the Court of Appeals, on June 4 the District Court contacted HEW and requested their attention. HEW did not respond until June 11, and it was not until June 16, after thirteen (13) of the allotted thirty (30) days had elapsed, that the professional staff of the school system was able to establish a working relationship with HEW.*30

Although a great deal of work was done and every effort was made, no plan could be agreed upon by the School Board and HEW within the remaining allotted time, seventeen (17) days. In accordance with the decree, HEW filed its own recommendations with the District Court on July 10.

On July 21, 1969, the School Board filed extensive objections to the HEW proposal pointing out in some detail why various portions of the HEW recommendations are educationally unsound and incapable of effective administration. At the same time, as also provided by the decree, the School Board filed its recommended alternatives. When it became apparent that the District Court did not intend to have a hearing, the School Board supported its objections and alternative recommendations by affidavit testimony filed in the District Court on July 29, 1969.*31

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*30 Affidavit testimony of James A. McPherson, filed in the District Court on July 29, 1969 (pages 4 & 5).

*31 The affidavit of James A. McPherson, referred to in footnote 30, filed in the District Court on July 29, 1969.

Although the Court of Appeals decree had invited them to do so, Petitioners and the Justice Department chose not to submit alternative recommendations of their own to the court; **and neither of them requested the district court to hold an evidentiary hearing.**

On August 1, 1969, the District Court, consistent with the mandate of the Court of Appeals, entered its order approving a plan for operation of the school system for the 1969-70 school year. In formulating this order the District Court, using its own knowledge of the school system and current circumstances as it had done on a previous occasion, put together its own desegregation plan. In doing so, it rejected almost entirely the alternatives recommended by the School Board, and rejected in part and accepted in part the recommendations of HEW.

This desegregation plan formulated by the District Court itself, did essentially the following things:

(a) It required and accomplished integration of faculty in every school of the system.

(b) For all but nine (9) of the then eighty nine (89) schools of the system it established revised unitary attendance zones, drawn on a basis taking race into account along with other factors in order to maximize integration. (Resulting in the assignment of approximately 70,000 of the systems then 73,500 students to bi-racial schools).*32

(c) It required the School Board, again working with HEW, to undertake further study and effort toward the development of a still further modification of the desegregation plan with reference to those schools east of Inter-

*32 Although some 70,000 were assigned to bi-racial schools, only 55,314 enrolled and attended. The others moved their place of residence, entered private school, dropped out of school, or in some other manner, beyond the Board's control, avoided their bi-racial assignment.

state Highway 65, where the excepted nine (9) are located; and to submit the suggested modifications to the court by December 1, 1969, for implementation in September 1970.

The School Board moved immediately to comply with this Order of the Court, as it had done with all previous orders, and began implementation of the order, in good faith, with the opening of school for the 1969-70 school year. Good faith implementation was continued throughout the school year, until of course, the plan was subsequently changed by the court in the midst of the school year.

In the meantime an appeal was taken by Petitioner from the District Court order of August 1. The Justice Department did not appeal. On the appeal the Petitioner took the position that the plan devised by the District Court was satisfactory as it applied to the **rural** portion of the system, satisfactory as to the **urban** portion of the system **west** of Interstate Highway 65, and unsatisfactory **only** as to the aspect of student assignment for that portion of the system **east** of Interstate Highway 65.*33 The Justice Department took the position that the Order of the District Court was satisfactory in every respect, stating in its brief to the Court of Appeals:*34

> "Under the circumstances of this case, we believe the August 1 Order is consistent with this Court's June 3, 1969 decision in this case."

In the Court of Appeals the case was consolidated with others and heard by the court sitting en banc. The Court of Appeals reversed the District Court in all of the other

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*33 Brief of Petitioner (Appellant there) in the Court of Appeals on August 12, 1969 (pages 5-6).

*34 Brief of the Justice Department in the Court of Appeals on August 22, 1969 (page 5).

consolidated cases and sustained the District Court in this case.*35 Upon certiorari to this court, the Court of Appeals was reversed, and the case remanded for further proceedings consistent with **Alexander v. Holmes County Board of Education**, 396 U.S. 19.*36

In the meantime the professional staff of the school system had restudied the area east of Interstate Highway 65, as instructed by the District Court in its Decree of August 1, 1969, and filed its recommendations in the District Court on December 1, 1969. HEW disregarded the District Court directive to work with the School Board, and filed hastily prepared recommendations (three alternative recommendations) in the District Court, also on December 1, 1969.*37

Upon remand from the Supreme Court, the Court of Appeals directed all counsel to propose to the court an expeditious manner of proceeding with the case. The School Board responded, and among other things suggested **immediate remand to the District Court for an evidentiary hearing**, with directions to the court to have the **hearing** and enter its order not later than January 26, 1970, so as to enable the Board to begin implementation immediately upon commencement of the second semester of the school year.*38 The Justice Department and Petitioner both responded, but did not suggest an evidenti-

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*35 **Singleton v. Jackson Municipal Separate School District**, 419 F.2d 1211.

*36 **Carter v. West Feliciana Parish School Board**, 396 U.S. 29 (1970).

*37 The HEW recommendations are discussed in full in a later section of this brief, at pages 60 et seq.

*38 Counsel's letter to the Judges of the Court of Appeals dated January 17, 1970, with proposed decree attached.

ary hearing, although Petitioner loudly complains now for lack of a hearing.*39

On January 21, 1970 the case was sent by the Court of Appeals back to the District Court, **without** directions for an evidentiary hearing, although such had been requested by the School Board.

The next day, January 22, 1970, the District Court held a conference of all attorneys at the conclusion of which the court asked the School Board to submit to the Court any modifications that it cared to suggest in its previously submitted plan of December 1, 1969 and asked the Justice Department to submit any suggestion it might have for modification of the HEW December 1 submission; noting that as they stood, neither of these plans were acceptable to the court.*40

The Justice Department hastily prepared some revisions of the HEW recommendations. This work was exhibited to the District Court at a second conference with the Court on January 27, 1970. At that time however, the essential part of the work, the maps setting out the proposed attendance zones, were not complete. Copies were not given to the court, nor to counsel and nothing was filed of record with the Clerk of the Court.*41

Contrary to what is stated in Petitioner's brief (page 19) where it is said . . . "The School Board failed to

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*39 Memorandum of the Justice Department filed in the Court of Appeals on January 17, 1970 and proposed decree filed by the Petitioner in the Court of Appeals (undated) in January 1970.

*40 Both dealing **only** with that part of the urban portion of the system **east** of Interstate Highway 65.

*41 Notwithstanding an order of the District Court dated January 28, 1970 noting that the Government submitted a revised plan at 9 a.m. on Tuesday, January 27, perusal of the court file and the docket entries make it clear that nothing was filed of record. Nor were copies furnished counsel.

respond to the Court's request." . . . on January 30, 1970 the School Board filed a five (5) page response in which it suggested several very minor modifications, and pointed out the following things:*42

> "2. These recommendations were developed over a period of approximately three months. They reflect the expert thinking and best judgment of competent, trained, professional educators who are thoroughly and intimately familiar with the school system. The desegregation plan embodied in these recommendations was soundly conceived and carefully fashioned in order to comply with all legal requirements imposed by the Court; and at the same time to do so in a manner that will be educationally sound, will cause the least possible hardship to the least number of students, parents and teachers, and will present the least possible danger of destruction of or substantial harm to the school system. If there were other recommendations that would accomplish all of these things better and more fully they would have been included as a part of the December 1 recommendations to begin with; but there are none.
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> 3. It should be pointed out that what the Court has now done is to order the Board to attempt to have its professional staff to hastily, in a matter of several days, alter and revise the end product of this three months of extensive, careful, analytical work. Such a hasty effort cannot be expected to produce competent results. If we were merely dealing with maps and figures on a piece of paper this would present no problem; but we are not, we are dealing with human beings, children, and the very life of a public school system. The professional staff people indicate

*42 RESPONSE TO ORDER filed by the Board in the District Court on January 30, 1970.

that what the Court has suggested calls upon them to violate and sacrifice professional standards and principals that they, as professional educators, hold inviolate, and this they cannot do."

Facing a mandate to enter an Order before February 1, and finding the HEW recommendations, the School Board recommendations and the Justice Department revisions all not to its liking, and there being insufficient time for an evidentiary hearing, the District Court once again drew upon its own knowledge and prepared a new set of attendance zone lines for the schools concerned, ie, those in that part of the urban portion of the system lying east of Interstate Highway 65. The court, on January 31, 1970, entered its Decree setting out these zone lines for implementation as soon as practicable. This Decree also added to the existing desegregation plan, a majority to minority transfer provision.

Although the School Board was confronted with a major upheaval and the task of rearranging a large part of the school system during the middle of a school term, necessitating the displacement and reassignment of some 15,000 students, they set about the task in good faith.*43 On March 20, 1970 full implementation was completed. On April 14, in response to directions from the Court of Appeals, the District Court made supplemental findings of fact in support of its January 31, 1970 decree.

In the meantime, appeals were filed by Petitioner and the Justice Department, and a cross-appeal by the School Board. As these were pending the 1969-70 school year ended in virtual chaos, with boycotts by white and black students and parents objecting to forced reassignment, massive absenteeism, racial disorders in a number of

*43 Refer to the School Board's REPORT TO THE COURT dated February 23 and filed in the District Court on February 24, 1970.

schools necessitating use of the police riot squads, large scale residential relocation, an upsurge of school vandalism, defiance of school authorities, the court and law enforcement officials by parents and students, and large scale disruption of the normal educational process in general. Essentially, the school year ended on January 31 for a large part of the school system, because the education process simply came to a halt.

1970-1971

On June 8, 1970 the Court of Appeals, on the pending appeal, entered an opinion and judgment setting out a new plan of student assignment for that part of the urban portion of the school system lying **east** of Interstate Highway 65.*[44] As its judgment the Court adopted in toto the Justice Department revised plan exhibited to the court, but never formally filed of record, in the January 27, 1970 conference. This material, maps and accompanying statistical tables, was furnished to the Court of Appeals, ex parte, by attorneys for the Department of Justice. It was not a part of the record designated by any of the parties for the Court of Appeals. It represented not the work of an educator or school administrator, but of a Justice Department Attorney and a young female statistical clerk, over a period of four days. It came to the Court unauthenticated, and unsupported by testimony of any sort. This perhaps explains the obvious mistakes referred to in footnote 44.

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*[44] **Davis v. Board of School Commissioners of Mobile County**, 422 F.2d 1139 (1970). For no apparent reason, and we think inadvertenly without realizing it, the Court of Appeals also changed a number of zone lines in the WESTERN part of the urban portion of the system which had no effect whatsoever from the standpoint of desegregation, but very badly overcrowded some schools and left others under utilized. These mistakes were subsequently corrected by the District Court in its Orders of July 13 and 30, 1970.

The School Board strongly protested the exparte handling of so serious a matter, and with good reason.*45

Nevertheless, on June 12, 1970, the District Court entered its order requiring the School Board to implement the new plan set out by the Court of Appeals. Promptly, and in good faith, the Board and its professional staff set about the difficult task of compliance; beginning a program to educate the public to the substantial changes required by the court; and formulating the necessary steps to be taken within the school system, including the conversion of three high schools to junior high schools.

Then, on July 13, 1970 without notice to the School Board nor an evidentiary hearing, the District Court entered another order which, in essence, set out a still further and different plan of student assignment for the area concerned, ie, the schools in the eastern part of the urban portion of the system.*46 Once again, for the second time in five weeks, the School Board began the task

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*45 See:

(1) Objection To A Portion Of The Record, filed by the School Board in the District Court on March 28, 1970.

(2) Objection To Attempt To Informally Place Unauthenticated Documentary Material Into The Record In The Court of Appeals and Motion To Strike And Expunge, filed in the Court of Appeals by the School Board on March 28, 1970.

(3) Petition For Rehearing, filed in the Court of Appeals on June 24, 1970 (mistakenly dated May 23, 1970).

*46 The School Board nor its counsel have knowledge of why the District Court took this action. We assume, that the District Court, faced with the task of overseeing and enforcing the operation of a desegregation plan that was simply impossible of effective implementation (due to the lack of knowledge, and expertise of its authors, its gross statistical inaccuracy and other purely functional impossibilities) concluded that someone had to do something other than sit by and watch the school system blow apart. We had pointed out a number of these problems in our Petition for Rehearing, a copy of which had been mailed to the District Court at the time of filing.

of preparing the public and the school system for an entirely new desegregation plan.

Petitioner took an Appeal from the Order of July 13, and sought an injunction staying the order of the District Court. The School Board filed a Response in which it noted that it was in the unusual position of defending a District Court Order that it had not sought, and one with which it could only partially agree.*47 We then pointed out to the Court of Appeals a comparative analysis of the two plans which indicated clearly that the District Court approach not only avoided many of the functional impossibilities and points of educational unsoundness (with which we were most seriously concerned) but also actually **increased** the extent of integration as well.

On August 4, 1970, the Court of Appeals denied the Motion to Stay and entered an opinion sustaining the District Court.

In the meantime, on July 30, the District Court, without notice to anyone, had entered a further order, modifying thirty-two (32) of the attendance zones established just seventeen (17) days earlier by its Order of July 13.*48

Again, for the third time in less than two months, the School Board was faced with the task of making a sub-

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*47 Response to Motion, filed in the Court of Appeals on July 28, 1970.

*48 On this occasion the School Board had knowledge that the District Court contemplated some modification of its zones, to remove the mistakes (referred to in footnote 44) in several zones in the western part of the urban portion of the system, which had not been cured by its Order of July 13. To this end, the School Board, **when called upon to do so,** responded and advised the District Court, of the nature and location of these mistakes. Our mistake (the mistake of counsel; which we freely admit) was that in responding to the request of the District Court for information, we did not reduce our response to writing and send copies to opposing counsel.

stantial rearrangement of the school system. With the opening of school five weeks away, the Board moved promptly, if a bit frantically, to prepare the public and the school system for implementation of this new order.

On August 17, Petitioner, after delaying eighteen (18) days, appealed and moved the Court of Appeals for summary reversal. This appeal and motion were **not timely** inasmuch as the Court of Appeals had previously suspended the Federal Rules of Appellate Procedure for this and every other school case in the circuit, to require the filing of all appeals within fifteen (15) days.*[49] This point was raised by this counsel and by counsel for the Mobile County Council Parent-Teacher Associations, an intervening party.*[50]

Nevertheless, the Court of Appeals entertained the appeal and the motion and on Friday, August 21, notified this counsel of a conference in the Chambers of Judge Griffin Bell, one of the Judges of the Court, the following Monday, August 24. This conference was most irregular in that the Court did not notify counsel for the County Council, PTA, of the conference or invite their attendance, as a consequence of which they were not present.*[51]

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*[49] **Singleton v. Jackson Municipal Separate School District**, 419 F.2d 1211.

*[50] Petition For Rehearing and For Stay, filed by the intervenor, Mobile County Council PTA, on September 4, 1970; denied on September 18, 1970.

*[51] The Court did entertain and permit the presence of an incidental party defendant to the litigation, one David Jacobs, a black militant who has twice been arrested and convicted in connection with activities in leading disruptions at two schools in the system (once in the Prichard, Alabama Police Court and once in the Mobile Police Court) and who on May 16, 1969 was **enjoined** by the District Court from obstructing and preventing the attendance of students and faculty members by **intimidation** and other activities. Mr. Jacobs accompanied Petitioners counsel to this conference. We were not advised by the court of the reason for his presence.

Following this conference, on August 28, with the opening of school eleven days away, the Court of Appeals entered an opinion "terminating" the appeal in which it partially granted and partially denied the Motion For Summary Reversal; and in addition, required certain further rearrangement of several attendance zones, not involved in the appeal.

Once again, for the fourth time in less than three months, and with the opening of school eleven (11) days away, the Board turned in good but weary faith to the task of a substantial rearrangement of the school system.

On September 9, 1970 the 1970-71 school year commenced amid the chaos of a plan of student assignment pierced together at various times by the District Court, HEW, a Justice Department attorney, the Court of Appeals, a young lady statistical clerk and finally Judge Griffin Bell. In essence, this school year opened as the past year had closed; boycotts by white and black students and parents objecting to forced assignments, massive absenteeism (first day enrollment 62,094, down approximately 11,400 from the end of school last year), defiance of school authorities, racial disorders and physical violence in several of the schools (necessitating use of the police riot squad, and at one high school the daily attendance of approximately 80 uniformed officers) numerous arrests of students, and large scale disruption of the normal educational process.

In the meantime the Petition for certiorari has been granted and the Opinion and Judgment of the Court of Appeals (actually three opinions, June 8, August 4 and August 28) are before this Court for review.

IV. Summary

The school system has been fully and affirmatively desegregated in every respect, except, it may be contended, student assignment. With regard to student assignment, the **rural** part of the system and the urban or city part of the system **west** of Interstate Highway 65 have been fully and affirmatively desegregated as a result of the implementation in September, 1969 of the plan of student assignment devised by the District Court, approved by the Court of Appeals, en banc (**Singleton v. Jackson,** 419 F.2d 1211) and reviewed by this court on certiorari (**Carter v. West Feliciana Parish School Board,** 396 U.S. 290, per currium, 1970). The method of student assignment used in each of these areas is unitary attendance zones drawn by the court itself.

Thus we can define the essential point at issue as relating only to the element of student assignment for that part of the urban or city portion of the system located **east** of Interstate Highway 65.

On June 8, 1970, the Court of Appeals, on the appeal from the District Court order of January 31, 1970, entered the first of the three combined opinions now before this court for review. This opinion and judgment concerned primarily student assignment for these schools **east** of Interstate Highway 65 and set out a complete and specific plan of student assignment for these schools. This plan set out by the Court of Appeals is one that had been submitted to the Court by the United States Department of Justice, which had in turn prepared the plan by modifying a plan originally devised by the Office of Education of the Department of Health, Education and Welfare. As with the remainder of the system, the method of student assignment used by this plan is unitary zones. This plan also

closed some schools, consolidated others, paired others, recast the grade structure of others and completely redesigned all of the attendance zones east of Interstate Highway 65. Under this plan, all of the forty-one schools affected by the order lying east of Interstate Highway 65 became thoroughly bi-racial in student body composition, except eight elementary schools.*52

The subsequent order of the District Court on July 13 eliminated two more of the remaining all black schools, one by closing, and one by redesigning attendance zones, leaving only six.*53 Thereafter, the Court of Appeals in its order of August 4, 1970 (the second of the three orders now on review) eliminated yet another all black school by assigning, through pairing, 129 white students to theretofore all black Robbins Elementary School.

At that point, the five schools remaining all black, as classified by the court, were:

Name	White	Black
Owens	2	1300
Fonville	37	787
Stanton Road	5	826
Brazier	0	1120
Grant	30	850

All of these schools are located more or less in the middle of fairly densely populated residential areas that

*52 A statistical table of the number of black and white students assigned to each school by this plan was included by the Court of Appeals in its Opinion, which is a part of the printed Appendix.

*53 The Court of Appeals in its August 4, Opinion said seven, counting Council with 40 white and 427 black students as all black. A copy of the statistical table filed in the record by the District Court in connection with its July 13 Order, is attached to this brief as APPENDIX II.

have, for the most part since the inception of this litigation, become either all black or very predominantly black in character. Two, Owens in the City of Mobile and Grant in the City of Prichard, are in areas that are totally urban and most of the housing is in the form of Federally funded urban renewal projects, subject to the Federal Open Housing Laws. The other three, Fonville, Stanton Road and Brazier, are located in areas of a suburban nature. Two of these areas, Fonville and Stanton Road, were, at the beginning of this litigation, all white in character but have now become very predominantly black. The racial make up of all five of these zones and schools results entirely from voluntary residential patterns, and is thus the result of a pure *defacto* situation, rather than any practice of maintaining segregated schools by law, by design or by any other device (see **Deal v. Cincinnati Board of Education**, 419 F. 2d 1387).

On August 28, in the final of the three orders being reviewed, the Court of Appeals further increased the statistical extent of integration by redesigning two elementary school zones and by pairing four more elementary schools.

With the opening of the 1970-71 school year on September 9, 1970, the plan of student assignment placed into operation, as ordered by the court, produced the following assignment of students and faculty for the area concerned, the schools **east** of Interstate Highway 65.

NAME OF SCHOOL	RACIAL CHARACTER OF SCHOOL IN DUAL SYSTEM ERA	CURRENT (1970-71) RACIAL CHARACTER OF STUDENT BODY	1970-71 STUDENTS ASSIGNED B	1970-71 STUDENTS ASSIGNED W	1970-71 FACULTY ASSIGNED*3 B	1970-71 FACULTY ASSIGNED*3 W
BIENVILLE	W	Bi-racial*1				
BLOUNT	B	Bi-racial	1233	1041	36	41 (12)
BRAZIER		B	1006		14	17 (3)
BROOKLEY	W	Bi-racial	71	490	7	10 (1)
CALDWELL	B	Bi-racial	307	11	6(½)	3½(6½)
CARVER	B	Bi-racial*2				
CENTRAL	B	Bi-racial	1563	231	24	27(8)
CHICKASAW	W	Bi-racial	75	448	6	8(2)
CLARK	W	Bi-racial	903	687	23(1)	34(2)
COUNCIL	B	Bi-racial	404	50	6(1)	8
CRAIGHEAD	W	Bi-racial	516	242	11	16(1)
CRICHTON	W	Bi-racial	144	352	7½	11(1)
DUNBAR	B	Bi-racial	940	86	14	13(9)
EANES	W	Bi-racial	181	823	13(3)	23
EVANS	W	Bi-racial	118	91	8	8
FONVILLE	B	Bi-racial	866	15	13	9(11)
GLENDALE	W	Bi-racial	574	257	10	14(2)
GRANT	B	Bi-racial	1077	7	16	9(15)
HALL	B	Bi-racial	852	190	18	23(4)
HAMILTON	W	Bi-racial	204	414	7	11
LEINKAUF	W	Bi-racial	252	194	6	8
MARYVALE	W	Bi-racial	207	395	8	12
MERTZ	W	W		373	4	7
MOBILE COUNTY TRAINING	B	Bi-racial	699	202	14	8(12)
MORNINGSIDE	W	W		674	8	11(1)
MURPHY	W	Bi-racial	1546	1054	31(7)	58
OLD SHELL	W	Bi-racial	357	117	5	6(1)

NAME OF SCHOOL	RACIAL CHARACTER OF SCHOOL IN DUAL SYSTEM ERA	CURRENT (1970-71) RACIAL CHARACTER OF STUDENT BODY	1970-71 STUDENTS ASSIGNED B	W	1970-71 FACULTY ASSIGNED B	*3 W
OWENS	B	B	1479		20	13 (17)
PALMER (SNUG HARBOR)	W	Bi-racial	493	104	10	5 (9)
PHILLIPS	W	Bi-racial	820	364	18 (1)	28
PRICHARD	W	Bi-racial	566	187	12 (1)	19
RAIN	W	Bi-racial	111	1155	23	35
ROBBINS		Bi-racial	702	129	9 (1)	12 (2)
STANTON ROAD	B	Bi-racial	894	4	13	17 (2)
TOULMINVILLE	W	Bi-racial	454	247	12	14 (3)
TRINITY GARDENS	B	Bi-racial	969	171	15	17 (6)
VIGOR	W	Bi-racial	1385	990	36 (6)	60 (3)
WASHINGTON	B	Bi-racial	780	636	14	11 (11)
WESTLAWN	W	W		322	4 (1)	7
WHITLEY	B	Bi-racial	345	127	6	7 (3)
WILLIAMS	W	Bi-racial	41	533	8	11
WILLIAMSON	B	Bi-racial	570	594	18	25 (2)
WOODCOCK	W	Bi-racial	97	145	5 (2)	10½

*1 By Court order Bienville has become a part of the Vigor High School Complex, which has an assigned enrollment of 1385 black, 985 white.

*2 By Court order Carver has become a part of the Blount High School Complex, which has an assigned enrollment of 1233 black, 1041 white.

*3 The figures in parenthesis indicate the number of vacancies, by race, yet to be filled in order to reach the 60/40 ratio.

We would redirect your attention to the statistical table set out in an earlier section of this brief (page 7) for a view of the assignment of students for the whole system produced by the total desegregation plan placed in full implementation with the opening of school on September 9, 1970.

V. Petitioners' Contentions

Over the past eight years all of the **normal** techniques of desegregation ever devised — — the option plan, unitary zones, freedom of choice, majority to minority transfers, zones drawn on a non-racial basis, zones drawn on a racial basis, alteration of grade structure, enlargement of zones, reduction of zones, consolidations, closings, pairing of adjacent schools — — have been imposed upon the Mobile County Public School System. Some of these techniques are educationally sound some of them not.

From the standpoint of education the results are totally ungratifying. From the standpoint of desegregation, it is now abundantly clear that this school system is desegregated to the maximum extent that can be produced by **normal** techniques and any further rearrangement of the school system by such abnormal devices as massive bussing, cross-bussing, now-contiguous pairing, or any other arbitrary manipulation of students, can only be the pursuit of an arbitrary and artificial racial balance. And this is exactly what Petitioner now seeks.

As we understand the thrust of Petitioners contention, it is that despite the fact that total desegregation has been achieved, and despite the fact that this is a unitary school system, further abnormal devices in pursuit of a racial balance are justified, because:

(a) The District Court has not had evidentiary hearings;

(b) there have been exparte proceedings with the Court;

(c) the School Board has used certain techniques such as bussing black children, changing grade structure, portable classrooms, building and closing schools and manipulation of attendance zones, to maintain segregation.

We would rejoin these contentions briefly.

(a) **Evidentiary Hearings**

The District Court held exhaustive evidentiary hearings in 1963, 1965, 1967 and 1968. If anyone has been handicapped for lack of an evidentiary hearing since the July 1968 hearing, it has been the School Board, not petitioner. Without giving the Board the opportunity to offer proof of the soundness of the several proposed plans of student assignment it has filed in the district court since July 1968, the court has on each occasion rejected the Board's proposals entirely, in favor of plans devised by HEW, the Department of Justice and the Court itself, which have not had to stand the test of an open hearing. When this case was remanded by this Court in January 1970, (**Carter v. West Feliciana Parish School Board**, supra) the School Board, not Petitioner, urged that there be an evidentiary hearing and was ignored.*54 As we have pointed out in an earlier section of this brief (pages 24, 33-34) petitioner's complaints are all **after the fact** and it is obvious that Petitioner is not so much interested in having evidentiary hearings, as it is in complaining for lack of such hearings.

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*54 See:

(1) Letter of this Counsel to the Court of Appeals, dated January 17, 1970 and proposed decree attached.

(2) Memorandum of the Justice Department filed in the Court of Appeals, January 17, 1970.

(3) Proposed decree filed by Petitioner in the Court of Appeals (undated) in January, 1970.

(b) **Exparte Proceedings**

Certainly there have been exparte proceedings, **by counsel for all of the parties.** In an earlier part of this brief (page 39) we freely admitted the mistake of this counsel in responding to the District Judge's oral **request** for information, without reducing our response to writing and sending copies to the other parties. No later than Wednesday, September 23, 1970, while this brief was in preparation we had another exparte request for information from one Jerris Leonard, Esq., Chief of the Civil Rights Division of the United States Department of Justice. In a complex case such as this, it seems that exparte activity is inevitable. Nor do school board attorneys have a corner on the market. We have reference to:

(1) Petitioners exparte conference with the District Court in March 1970.*55

(2) The Justice Department's exparte hearing before the district court on September 14, 1970.*56

(3) Petitioners' failure to serve all parties with copies of important pleadings, and the making of false certification of service.*57

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*55 As referred to in Petitioner's own Motion For Injunction Pending Appeal, filed in the Court of Appeals in March 1970. See School Board's Opposition to the Motion For Injunction, pages 3 and 4 and footnote 1.

*56 See: School Board's Report To The Court, September 16. 1970.

*57 Petitioner's Motion For Summary Reversal filed in the Court of Appeals on August 17, 1970 was not served on all parties. See: Petition of the Mobile County Council of Parent-Teacher Associations (one of the parties) for Rehearing and a Stay of the Court of Appeals Order of August 28, 1970 which resulted from the exparte hearing on the motion for summary reversal (pages 5-6), filed in the Court of Appeals on September 4, 1970.

(4) The Justice Department's exparte submission of documentary material, not a part of the record, to the Court of Appeals.*58

(5) The Court of Appeals failure to notify all parties and counsel of hearings in chambers as a result of which the Mobile County Council PTA, one of the parties, was not present at a most important conference in the Chambers of Judge Bell on August 24, 1970.*59

We do not complain of these occurrences. We simply note them, lest the impression be left that the School Board alone is at fault.

(c) **Techniques to Maintain Segregation**

Closing schools: Contrary to Petitioners implication, every school closing in the last five years has resulted in an **increase** in the extent of desegregation, rather than a decrease. We would refer you to the full discussion at pages 30-33 of this brief.

School Construction: The last new schools constructed in the system opened their doors in 1967 (two) and 1968 (one). All three have bi-racial student bodies (see page 15 of this brief). Two proposed construction projects in 1968-69 were approved by the District Court and reversed by the Court of Appeals. One has now been abandoned and the other has an assigned enrollment of 454 black and 247 white (see page 15 of this brief).

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*58 See:

(1) School Board's Petition For Rehearing, filed in the Court of Appeals on June 24, 1970.

(2) School Board's Objection To and Motion To Strike and Expunge filed in the Court of Appeals on March 28, 1970.

(3) School Board's Objection to a portion of the record, filed in the District Court on March 28, 1970.

*59 See: Petition of PTA Council for Rehearing and For Stay filed in the Court of Appeals on September 4, 1970.

Manipulating Attendance Zones and Portable Classrooms: Since 1965 all students have been assigned to schools on the basis of zones either approved by the court or drawn by the court, excepting a brief period of freedom of choice (see pages 22-41 of this brief). Portable classrooms are used only to provide emergency space to accommodate overloads resulting from the assignment of students by the court (see pages 17-18 of this brief).

Changing Grade Structure: Unquestionably this school system has had a varied grade structure. Initially this resulted in part because of its combination rural-urban character, and in part because of the continuing effort to shift from the old style elementary, junior high, senior high concept (elementary grades 1-6, junior high grades 7-9, senior high grades 10-12) to the more modern middle school concept (elementary grades 1-5, middle school grades 6-8, senior high grades 9-12). In more recent times the varied grade structure has resulted from the **court orders** which have imposed upon the system a number of grade structure arrangements thought to be educationally unsound; such as a school for grades 6-9, or a school for grades 1, 2, 3 and 5, or a school serving grade 8 only (as proposed by HEW), or a school serving grades 1 and 2 only or 5 and 6 only (as contained in Plan B-1 Alternative proposed by Petitioner, pendente lite).

Bussing of Black Students: Admittedly, during the era of the dual system and until a short time after this litigation began, black students were bussed to preserve segregation. This is a shameful part of the **past** of this system, just as slavery is a shameful part of this nation's past. It was wrong then, it is wrong now; and two wrongs never made a right. It was educationally unsound then, it is educationally unsound now. Those who would attempt to justify bussing now, on the basis of bussing in the past, are seriously hampered by their own obvious inability to deter-

mine whether they are more interested in education or **retribution and revenge.** Petitioner cites to the court impressive figures to indicate the existence of substantial bussing now. The court must bear in mind, as Petitioner failed to note, that all of this bussing is in the **rural** portion of the system where there has always been and probably always will be a substantial transportation need to fill. The mere existence of transportation in the rural part of the system hardly stands as justification for the creation of an urban transportation system. Transportation in the rural portion of the system is of course on a fully integrated basis (see pages 11-12 of this brief).

VI. The Relief That Is Needed

The desegregation plan now in implementation, insofar as it concerns the schools **east** of Interstate Highway 65, is a piecemeal concoction put together by the Court of Appeals from various bits and pieces devised at various times by HEW, the Justice Department and the District Court. It has no integrity, nor rationality.

While the Court of Appeals spoke in terms of devising a plan consisting of **neighborhood schools**, and Petitioner has seized upon this as a vehicle to place before this court a consideration of the constitutionality of the neighborhood school concept, the plan devised and promulgated by the Court of Appeals is anything but a neighborhood school plan. To immediately verify this, one need only look at the map reflecting the elementary and junior high school zones devised by the court and now in use (the maps filed in the District Court on July 30 and July 13, 1970, respectively).

Based upon these zones, sixth grade students in the Mertz elementary zone for example are required to travel up to seven (7) miles diagonally across the City of Mobile, crossing six major traffic thoroughfares — — U.S. High-

way 90, Cottage Hill Road, Airport Boulevard, Dauphin Street, Old Shell Road and Springhill Avenue (U.S. Highway 98) — — at peak traffic hours to attend a school that has an overload of almost 600 students (capacity 986, assigned enrollment 1525); while their **true neighborhood school**, Mertz Elementary School is within easy walking distance of less than a mile and a half and has vacant space. There are many other similar examples, but this should suffice to illustrate the point that the plan devised and promulgated by the court is not a neighborhood school plan, notwithstanding the court's characterization of it as **such.**

The school year traditionally opens in September each year. Normally, planning for each year would commence the preceding April or May. For the past five years it has been impossible to undertake any real pre-planning because of last minute court orders requiring substantial rearrangement of the school system in one way or another, such as a shift from neighborhood attendance zones to complete freedom of choice and then back again, or a substantial rearrangement of attendance zones and grade structure. Court orders requiring new and different desegregation plans were imposed upon this school system on August 16, 1966 for the 1966-67 school year; August 24, 1967 for the 1967-68 school year; July 29 and August 2, 1968 for the 1968-69 school year; and on August 1, 1969 for the 1969-70 school year. The 1969-70 school year was further disrupted by a further court order on January 31, 1970 requiring mid-year reassignment of some 15,000 students. Since January 1, 1970 this school system has already been under six different court ordered desegregation plans, none of which have been prepared by the Board or its professional staff. Three of these plans have been fully implemented, and three superseded by subsequent orders before they could be placed into full implementation.

Since October 1967, the desegregation plans implemented in this school system have been devised either by the District Court, the Court of Appeals, the Justice Department, HEW, or some combination thereof. The School Board and its professional staff people have been completely shoved out of the picture, and the chaos prevalent in the school system at this time is the end result. Neither of these parties seems to be able to satisfy the other, and the petitioner has **never been satisfied with anything.** As a result, the school system has become nothing more than a bloody corpse battered from pillar to post now lying there oozing its life's blood away while being carved and hacked to bits by its various antagonists. The death knell of utter chaos and collapse can be heard pealing softly in the distance, moving closer day by day.

The litigating parties in this case are the NAACP, and the School Board. It is not they, however, who are suffering from the seemingly interminable turmoil that the courts have unwittingly created; it is the public school children of Mobile County, black and white alike. Nothing speaks more eloquently of this than the following statistical table comparing the advance of the desegregation process year by year since 1965 when substantial integration first occurred, to the achievement of fourth grade students systemwide on the nationally recognized California Battery Achievement Test.

	1965 -66	1966 -67	1967 -68	1968 -69	1969 -70	1970 -71
Total number of schools	97	98	96	91	89	
Total number of schools with a bi-racial student body	10	15	34	57	68	
Total number of schools with a bi-racial faculty	0	0	10	89	88	
Total number of students enrolled in bi-racial schools	10474	15636	28558	47560	55314	
System wide achievement level (4th grade students) California Battery Scores as compared to grade placement. (grade placement equals 100%)	104.4%	100%	99%	91.5%	89.7%	Not Yet Compiled

In the table, grade placement equals 100%. Note that in the 1965-66 school year fourth grade students system-wide were achieving at a level 4.4% above fourth grade standards. Since that time there has been a steady downward trend, so that by last school year, 1969-70, fourth grade students system-wide were achieving at a level 10.3% below fourth grade standards. The tests have not yet been given for the current school year, but the results are predictable.

We urge this Court to breathe the breath of life back into this dying school system. We urge this Court to

direct the Court of Appeals to remand this case to the District Court for the formulation of a revised plan of desegregation for that part of the urban portion of the school system lying **east** of Interstate Highway 65; that the District Court be directed to:

1. Require the School Board to prepare and submit a proposed plan to the court;
2. Receive and consider any objections or modifications to the School Board's proposed plan, that any party to this case may wish to file;
3. Have an evidentiary hearing;
4. Approve a new plan by January 1, 1971 for implementation beginning the second semester of this school year, in February 1971.

We further urge that the District Court be directed to undertake the above in the light of certain principles that we shall propose at the conclusion of this brief.

SUMMARY OF ARGUMENT

The Mobile County Public School System was at one time a dual school system. The dual system has now been completely disestablished, and the Mobile County Public School System is now a fully integrated unitary school system.

The school system has been involved in desegregation litigation since 1963. This has resulted in a succession of orders by the District Court and the Court of Appeals, each requiring some further or different modification in the plan of desegregation being implemented in the school system. The School Board and its professional staff have sought in good faith to implement, properly and promptly, each order of the Court as it has been imposed; and to

otherwise discharge their legal and constitutional obligation, as it has from time to time been interpreted and defined by the Courts.

Since October 1967, the desegregation plans that have been implemented in the system have been devised by the District Court, the Justice Department, HEW, the Court of Appeals, or some combination thereof. The School Board and its professional staff have been completely shoved out of the picture. Since January 1, 1970 six different court ordered desegregation plans have been imposed upon the school system, none of them have been prepared by the Board or its professional staff. As a result, the school system is in a position of near chaos; faculty and staff morale is at low ebb; the Superintendent has resigned; enrollment has dwindled from 79,000 to approximately 68,000; system-wide student achievement has steadily declined for the past five years, taking a course essentially opposite the advance in the desegregation process during this same time period.

The Orders of the District Court and of the Court of Appeals now being implemented and now before this Court for review require: (a) the assignment of faculty throughout the system on the basis of a 60/40 racial ratio, (b) the assignment of students (in that part of the city or urban portion of the system **east** of Interstate Highway 65) to schools on the basis of what the Court of Appeals contends to be unitary geographic zones resulting in **neighborhood schools**. This is a totally inaccurate description of the content and effect of the court's orders. True, the zones are unitary, but they do not comport with the neighborhood school concept and do not result in neighborhood schools, due to gross gerrymandering, un-natural pairing of schools, and obvious inattention to numerous factors that would have been considered in the creation of a true system of neighborhood schools. Essentially, assignment

of students is on a basis calculated to produce an arbitrary racial balance of students in the schools concerned.

The orders of the court now in implementation result in the assignment of approximately 64,306 students (of a total of approximately 68,623 in the system) to schools with bi-racial student bodies. Nevertheless, Petitioners urge this court to reverse the orders of the lower courts, and pending the approval of a new desegregation plan by the District Court on remand, to order the implementation, pendente lite, of another plan of student assignment hastily prepared almost a year ago by HEW; which plan comes to this Court untested by hearing, unsupported by testimony and indeed totally unexplained.

It is the position of the respondent that the case should be remanded to the District Court for the development of a new plan of student assignment for that part of the system here concerned, consistent with the principles developed in the argument hereafter summarized. It is respondent's position in argument that:

I

The so-called plan B-I Alternative should not be imposed upon the Mobile County Public School System, because:

1. It has never been before any court for an evidentiary hearing; it is unproved, untested and unexplained.

2. On the other hand, upon the basis of the affidavit testimony of the Associate Superintendent who examined and analyzed it thoroughly, along with other members of the professional staff of the school system, it has been totally discredited.

3. It was hastily prepared by one with no knowledge of the school system. As a result it contains, in addition to

a number of overall functional drawbacks, approximately a dozen specific functional impossibilities.

4. It has been rejected by the lower courts as impracticable and educationally unsound.

5. It requires massive cross-town busing and cross-busing, beyond the immediate, as well as long range, capabilities of the school system.

II

The Orders of the lower court, insofar as they require the assignment of faculty on the basis of a racial ratio (60% white, 40% black) are contrary to what is required or permitted by the Fourteenth Amendment to the United States Constitution.

III

The constitutional foundation of all public school desegregation is the Fourteenth Amendment to the United States Constitution. **Brown v. Board of Education of Topeka**, 347 U.S. 483 (1954), in interpreting the Fourteenth Amendment, defines the constitutional rights of all public school students, black and white. This right is that they shall not be denied access to and use of public school facilities on account of race. This original interpretation has been both expanded and refined in subsequent cases, including **Green v. County School Board of New Kent County Virginia**, 391 U.S. 430 (1968) and **Alexander v. Holmes County Board of Education**, 396 U.S. 19 (1969), but it has not been changed nor abrogated, as indeed it could never be in view of the very language of the Fourteenth Amendment itself.

The Constitution of the United States neither requires nor permits the assignment of students in such a manner as

to achieve a racial balance in the school system. Similarly, the mere existence in this school system of seven schools with uniracial student bodies (2 all black and 5 all white, out of a total of 83 schools in the system) does not make this school system constitutionally deficient.

Under our Constitution, education is a right that must be made available to all on an equal basis; where dual school systems once existed they must be totally disestablished; students both black and white must be assigned to schools on a non-racial basis; school systems must be operated on a unitary basis within the framework of which no person is totally compelled to attend any school because of race or color, nor effectively excluded from any school because of race or color.

IV

Under our Constitution black and white public school students have an equal right to the benefit and protection of the Constitution and of the laws of the United States. Granted that every individual desire cannot be fulfilled and every individual problem solved, by and large, a true neighborhood school system is the most beneficial method of student assignment for the school system and for all children of the system, black and white. Assignment of all students on the basis of attendance zones fairly drawn to normal standards of educational soundness and upon the basis of non-racial criteria in order to produce as nearly as possible a system of unitary neighborhood schools, is a constitutionally sufficient plan of student assignment.

ARGUMENT

I

This School System Should Not Be Required to Attempt to Implement Plan B-I Alternative

What is Petitioner really seeking by certiorari in this case? **Ostensibly,** to have this Court review a decision of the Court of Appeals in order to insure Petitioners due process right to an evidentiary hearing, and to resolve conflicting rulings of the Courts of Appeal. We have already discussed in some detail (page 47) the evidentiary hearing aspect. From the standpoint of resolving conflicts, it is apparent that this would have been accomplished in **Swann v. Charlotte-Mecklenberg Board of Education** (Nos. 281 and 349), which was already before this Court when the Petition for Writ of Certiorari was filed in this case. Consequently there must be another reason. We suggest, that **in reality** what petitioner is really seeking, under the guise of pursuing an evidentiary hearing and resolution of conflicts, is to have this Court substitute its remote consideration and judgment for that of the District Court and the Court of Appeals, by ordering the *pendente lite* implementation of a desegregation plan that has already been rejected by both lower Courts on two different occasions as "impracticable" and "educationally unsound".

Under the circumstances it is revealing, important and perhaps essential to note that Plan B-I Alternative itself has **never** been before **any** court for an evidentiary hearing.

Plan B-I Alternative was prepared by HEW in two stages. The first stage was the work of Dr. Joe Hall of the Florida School Desegregation Consulting Center. It

was submitted to the District Court on July 10, 1969. Dr. Hall submitted a superficially impressive report of some 109 pages to the District Court. Well over half of these pages were devoted to a detailed discussion of typical Chamber of Commerce information, totally irrelevant to desegregation of the school system. For example, the report explains that among Mobile's major industries are cement, naval stores, ship repair, etc.; and its modern ocean terminal can handle 32 vessels simultaneously; and in 1965 unemployment in Mobile totaled 4.3 percent of the civilian "at place" labor force; and on and on it goes with reams of similar worthless information.*60

Dr. Hall's discovery testimony was taken by deposition, during which he declined to indicate just how much of the seventeen (17) days he spent on this matter was expended on such trifling, but he did reveal the following very significant facts:*61

> (a) The actual desegregation plan was prepared not by himself, but by one Dr. Stolee of Miami, Florida and one Dr. Weinkoff of South Carolina; both of whom had never been to Mobile before; both of whom had no prior contact with or information about Mobile or its school system; both of whom arrived in Mobile one day and departed the next, and prepared the recommendations during the short time of **less than 48 hours.**
>
> (b) He (Dr. Hall) had no ultimate authority with reference to the HEW report. Everything had to be approved by one Mr. Gregory Anrig of the Washington office of HEW. Mr. Anrig did not come to Mobile

*60 Refer to the HEW report filed in the District Court on July 10, 1969.

*61 Discovery deposition of Dr. Joe Hall, filed in the District Court.

and had no prior contact with or information about the school system. He had occasion to look at the proposed recommendations only once, for a short time, and yet required numerous changes and alterations.

Dr. Hall indicated to School Board officials that it was impossible for HEW to do a proper job of evaluating the school system and developing adequate recommendations within the time allowed by the Court for the report; and yet because of delay by HEW half of this time had elapsed even before he got started on his work. Dr. Hall also stated that he is professionally opposed to the busing of students for the sole purpose of achieving integration, and yet the ultimate HEW recommendations, after changes by Mr. Anrig, contained massive busing in pursuit solely of some sort of racial balance.*[62]

This first stage HEW report was filed in the District Court and was **totally unsupported** by testimony or explanation other than a very brief informal discussion with the District Court. This was conceded by Petitioner at pages 14b and 15b of the Appendix to its Petition for Writ of Certiorari previously filed in this Court in December 1969.

This report, and particularly the recommendations subsequently rejected as unsound by the lower courts but which Petitioner would now urge upon this Court, were soundly and thoroughly **discredited** by the only professional educator with any background knowledge of the school system who examined them.*[63]

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*[62] Affidavit testimony of James A. McPherson, filed in the District Court on July 29, 1969, page 4.

*[63] Affidavit testimony of James A. McPherson filed in the District Court on July 29, 1970 . . . . and . . . . Findings of Fact, April 14, 1970, pages 24-38.

The second state of Plan B-I Alternative was prepared by yet another HEW functionary, one Ernest S. Bunch who styles himself Acting Senior Program Officer, Equal Educational Opportunities, and submitted to the District Court on December 1, 1969. This stage was the result of less than two weeks attention by Mr. Bunch. Like Dr. Hall before him, Mr. Bunch had no prior contact with or knowledge of the school system.

Mr. Bunch's work took place over a period of less than two weeks, immediately prior to December 1, 1969. Mr. Bunch made no independent study of the school system, conducted no research and gathered no original statistical information. All Mr. Bunch did was to take statistical data from the earlier HEW report, juggle these statistics in several different ways and then set out four different alternative plans, one of which was labeled Plan B-I Alternative. Mr. Buch's ineptness is revealed in many aspects of his work, not the least of which are his recommendations that would make senior high schools out of elementary school plants, create one grade school and assign 2886 students to a school with a capacity of 980.

As with the original HEW report, this Plan B-I Alternative (as well as the other 3 alternatives) did not come before the Court for an evidentiary hearing, and in this instance there was not even an informal conference with the District Judge. Consequently, Plan B-I Alternative is not only totally **unsupported** by testimony, but was before the District Court and is now before this Court, even without **explanation**. In seeking to justify the soundness and integrity of his work in the report itself, Mr. Bunch is unbelievably terse, stating only, "all of the plans are based on educational concepts promulgated either recently or not so recently".

Plan B-I Alternative was subsequently thoroughly examined and studied by a professional educator, whose

affidavit testimony relative to this examination and study was filed in the District Court. This testimony pointed out numerous fatal defects, and totally discredited the plan, both from the standpoint of its educational unsoundness as well as its functional impossibility.*64

With this spurious background, it should not be surprising that Plan B-I Alternative is educationally unsound, administratively infeasible, detrimental to the school system as a whole including both black and white students, and functionally incapable of implementation. This has been recognized by both the District Court and the Court of Appeals, sitting en banc. (**Singleton v. Jackson**, supra).

Of the four different alternative plans submitted by HEW in its December 1, 1969 report, Plan B-I Alternative is by far the most unsound, most infeasible, most detrimental of all.

What are some of the specific defects in Plan B-I Alternative?

1. The plan purports to be based upon certain specific geographic zones, but no maps or other description reflecting or stating the location of the boundaries of zones is included with the plan. As far as present relevancy of the plan is concerned, the zones have been changed by the Courts on four separate occasions since the plan was filed on December 1, 1969. The plan, therefore, has absolutely no relation to reality at this time.

2. The basic statistical data upon which the plan was based is now outdated and inaccurate. The original statistical data was gathered and compiled by the School Board in September 1968, and reported to the court. It

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*64 Affidavit testimony of James A. McPherson, filed in the District Court on February 24, 1970 . . . . Findings of Fact, April 14, 1970, pages 24-38.

is now totally inaccurate. Spot checks made of this statistical information, shortly after the HEW report was filed on December 1, 1969, to determine accuracy and relevancy, indicated that in a number of instances the figures are in error by as much as 50%. The HEW report itself recognized this error and sought to excuse itself in advance with this seemingly innocuous statement: "These statistics may or may not agree with current figures of the Board of Education. However, they may be considered as relatively close approximates that could be used as a guide for a more precise sophistication in this vein." No doubt, fifty percent (50%) error is a close approximation to the sophisticated people of HEW, but it is quite impossible to operate a school system of 83 schools and 70,000 students on such a margin.

3. The plan requires the use of one elementary school (Gorgas) that has already been closed by the court and annexed to Toulminville High School (247 white, 454 black) on which campus it is located, to take care of an overload there which occurs as a result of other provisions of the existing Court ordered desegregation plan. This leaves no place for the 890 elementary students assigned to the Gorgas Elementary School by Plan B-I Alternative.

4. Similarly, Plan B-I Alternative requires for use as an elementary school, another school (Hall) that is already operating under the court ordered plan as a junior high school. Either the 1149 elementary students assigned to Hall by Plan B-I Alternative or the 1246 junior high students already assigned there by the Court of Appeals will have no school to attend.

5. Plan B-I Alternative does not assign to any school the 806 elementary students (300 white and 506 black) living in the Craighead zone.

6. Plan B-I Alternative makes no provision at all for the sixth grade students living in the following zones:

South Brookley	93
Williams	101
Indian Springs	76
Eight Mile	109
Dickson	121
Fonde	131
Shepard	74
Dodge	92
TOTAL	797

7. Plan B-I Alternative would assign 1174 elementary students to an Arlington-Council complex (Arlington capacity 476, Council capacity 544), but Arlington has already been closed by the Court, and is being used as a book depository and warehouse and as a laboratory for the in service training of teachers.

8. Plan B-I Alternative does not assign to any school the 591 elementary school students (424 white and 167 black) living in the Woodcock zone.

9. Utilizing Plan B-I Alternative, results in each of the 264 6th grade students in the Owens zone being assigned to two different schools at the same time.

10. Plan B-I Alternative requires two one-grade elementary schools; seventeen two-grade elementary schools and fifteen three-grade elementary schools, making the development of an adequate program in these schools impossible, and creating an intolerable transportation problem for parents because of the helter-skelter separation and disbursement of students to separate schools. Some students will have been assigned to as many as four different schools by the time they reach the 6th grade, and none will have been assigned to less than three.

11. The basic concept and arrangement of Plan B-I Alternative is a non-contiguous pairing of schools, re-

quiring one-half, more or less, of the students directly affected by the plan to attend school each year in schools far removed from their homes and neighborhoods. In all instances but ten, this requires the students to attend schools that are essentially across town from their homes; in the excepted instances (ten schools) it requires attendance not only across town, but in a different city (Indian Springs, Brazier, Robbins, Hamilton, Chickasaw, Palmer, Glendale, Fonde, Will and Whistler). There are approximately 27,320 students directly affected by Plan B-I Alternative; this means that each year approximately 13,660 of these students would be so affected. It should be kept in mind that these are not high school or junior high school students, but young elementary school students in grades 1 through 5.

12. Because of the non-contiguous nature of the pairings and the illogical manner in which they have been set up, requiring the movement of students long distances across town and from one city to another, it will be impossible for the approximately 13,600 cross-town students to walk to their schools and vehicular transportation will be imperative. To complicate matters, most of the pairings present travel requirements that are inconsistent with commercial transportation routes and normal vehicular traffic patterns.*[65] The only answer would be school bus transportation furnished by the School Board. At this point in time, this is totally impossible; not merely difficult, but impossible.

To implement Plan B-I Alternative would require 233 new buses. The acquisition cost of these buses would be approximately $1,269,484.19 and there would be a yearly

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*[65] The Mobile municipal transit system has within the past year closed entirely, then reopened on a limited basis. At this point it is entirely speculative as to what bus service, if any, will be available from time to time.

operating cost of $366,089.60 per year. This school system simply does not have the financial ability to accomplish such a requirement. It is entirely questionable as to whether the school system could adjust its finances to accommodate this requirement over a period of years; it is totally incapable of doing so immediately.*66

In Petitioners' brief a studied effort is made, by referring to the present existence of bus transported students, to give the impression that the bussing inherent in Plan B-I Alternative would be justified and would cause little or no problem. In evaluating this contention one must not lose sight of the fact that this is a consolidated city-rural system and that bus transportation has historically been provided for students in the rural part of the system, as is traditional with virtually all rural and consolidated systems. The existence of rural transportation, however, is totally irrelevant and unrelated to the problem that would be created in the city portion of the system by Plan B-I Alternative, and offers no justification for Plan B-I Alternative nor solution to the massive transportation problem it would create.

One further point must be considered. Given the financial ability to purchase the necessary buses, they still could not be obtained. In June 1970, in an effort to replace worn equipment and to improve existing service with relation to present needs, an order was placed for 50 new buses. Some weeks later, certain budgetary deficiencies and other financial problems necessitated a reduction of the order, at which time the manufacturer advised the school system that even the reduced order would not be filled because no buses are available for purchase.

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*66 Affidavit testimony of James A. McPherson filed in the District Court on February 24, 1970, pages 11-12.

These are some of the more readily apparent defects in Plan B-I Alternative which render it totally incapable of implementation. The Petition makes the bare, unsupported statement that Plan B-I Alternative has been **proved feasible.** This is simply not true. The plan has not been **proved;** on the contrary, it is not only unproved, but **untested,** and comes to the Court unsupported by testimony and even without explanation. It is not **feasible;** it cannot be implemented.

Under such circumstances all logic and reason would dictate that this court defer to the on the scene judgment of the District Court and the Court of Appeals, both of whom have rejected Plan B-I Alternative. This is entirely consistent with the prior holdings of this Court and the Courts of Appeal. **Brown v. Board of Education of Topeka,** 349 U.S. 294; **Green v. County School Board of New Kent County, Virginia,** 391 U.S. 430; **United States v. Jefferson County Board of Education,** 372 F.2d 836, 380 F.2d 385, Cert. Denied 389 U.S. 840; **Downs v. School Board,** 236 F.2d 988.

II

Does the Constitution of the United States Require That Public School Systems of the United States Assign the Teachers of the Systems to the Schools of the Systems in Such a Manner as to Achieve a Racial Balance of Teachers in Each School, or Some Other Arbitrary Mathematical Ratio of Black and White Teachers in the Schools of the System?

It is the position of the Respondent that not only is such action **not** required, but that constitutionally it cannot be permitted.

The first reference to faculty assignments appeared in **Brown II** where reference was made to the fact that the Courts may consider problems relating to personnel.

Brown v. Board of Education of Topeka, 349 U. S. 294, 400 (1955).

In a number of subsequent cases, the Courts generally held that the district courts might defer consideration on the faculty question pending further progress with respect to student desegregation. **Board of Public Instruction of Duval County, Florida v. Braxton,** 326 F2d 616, 620 (C.A. 5th 1964) cert. den. 377 U.S. 924 (1964); **Bowman v. County School Board,** 382 F2d 326 (C.A. 4th 1967).

At first, the Courts required only that faculty meetings and staff conferences be desegregated. **Singleton v. Jackson Municipal Separate School District,** 384 F2d 729 (C.A. 5th 1965). Subsequently boards were directed to make "an adequate start toward elimination of race as a basis for the employment and allocation of teachers, administrators and other personnel." **Singleton v. Jackson Municipal Separate School District,** 355 F2d 865 (C.A. 5th 1966). Then came **United States v. Jefferson County Board of Education,** 372 F2d 836 (C.A. 5th 1966), where, after observing that "These and other decisions compel states in this circuit to take affirmative action to reorganize their school systems by integrating the students, faculties, facilities and activities," (p. 868) the Court set forth a model decree which required the assignment of faculties so that at least one, and "wherever possible... more than one teacher of the minority race . . . be assigned to each school" (p. 900).

In **United States v. Montgomery County Board of Education,** 395 U.S. 225, (1969), the Supreme Court held that the Court of Appeals had erred in setting aside a district court order requiring the Montgomery County, system to achieve a racial balance in faculty assignments as a long term goal. However, this opinion did not purport to impose such a requirement on all systems, but merely recognized the discretionary power of a trial judge under the

particular facts of a specific case. At least it would so seem from the decision of the Fifth Circuit Court of Appeals rendered one month later in **United States v. Board of Education of Baldwin County**, 417 F2d 848 (C.A. 5th 1969), where a ratio of one in five for 1969-70 was required.

In December 1969 the Fifth Circuit Court of Appeals, in **Singleton v. Jackson Municipal Separate School District**, 419 F2d 1211 (C.A. 5th 1969), directed the 13 systems involved in that appeal, including Mobile County, as well as all other school systems then in litigation, to meet the following requirements:

> "Effective not later than February 1, 1970, the principals, teachers, teacher-aides and other staff who work directly with children at a school shall be so assigned that in no case will the racial composition of a staff indicate that a school is intended for Negro students or white students. For the remainder of the 1969-70 school year the district shall assign the staff described above so that the ratio of Negro to white teachers in each school, and the ratio of other staff in each, are substantially the same as each such ratio is to the teachers and other staff, respectively, in the entire school system. The school district shall, to the extent necessary to carry out this desegregation plan, direct members of its staff as a condition of continued employment to accept new assignments." (pp. 1217-18).

Then, in its opinion of June 8, 1970 the Fifth Circuit Court of Appeals required the Respondent School Board to achieve a 60/40 ratio of teachers throughout the system.

It is our contention that racial faculty assignments are invalid, indeed unconstitutional.

The necessary effect of **Brown v. Board of Education of Topeka**, 347 U.S. 483 (1954), was to elevate to constitu-

tional doctrine the first Mr. Justice Harlan's dissent in **Plessy v. Ferguson**, 163 U.S. 537, 559 (1896), to the effect that:

> "Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved."

Brown I was predicated not on an evidentiary finding that equal educational opportunity could not be achieved in fact except through integration, but rather upon the holding that racial classifications are invidious per se. **United States v. Jefferson County Board of Education**, 372 F2d 836, 871 (C.A. 5th 1966), adhered to on rehearing en banc, 380 F2d 385 (1967), affd. sub nom. **Caddo Parish School Board v. United States**, 389 U.S. 840 (1967).

In **Bolling v. Sharpe**, 347 U.S. 497, 499, 884 (1954), this Court declared:

> "Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect." (p. 499).

In striking down the Knoxville, Tennessee minority to majority transfer provision of the system's school desegregation plan, the Court declared:

> "Classifications based on race for purposes of transfers between public schools, as here, violate the Equal Protection Clause of the Fourteenth Amendment. As the Court said in Steele v. Louisville & N.R. Co., 323 U.S. 192, 203, 98 L.ed. 173, 194, 65 S. Ct. 226 (1944),

racial classifications are 'obviously irrelevant and invidious.'" **Goss v. Board of Education of Knoxville,** 373 U.S. 683, 687 (1963).

In **Teel v. Pitt County Board of Education,** 272 F. Supp. 703, 709-10 (D.C. N.C. 1967), the Court declared:

> "The Court does not intend, nor does it read the law to require, involuntary reassignment of teachers to achieve racial blending of faculties in each school in the Pitt County System. To do so would clearly be nothing more than racial assignments for racial purposes; such would indeed be inimical to a rational concept of equal protection of all persons under the law without regard to their race. A compulsive mass transfer to achieve racial blending would be an ill-advised and disruptive measure."
>
> "Desegregation and integration of faculty can and must be accomplished without the use of racial criteria, for equal protection of the law must work in both directions to be in fact and in law equal."

The Sixth Circuit, in **Deal v. Cincinnati,** 419 F.2d 1387 (C.A. 6th 1969), has also spoken on the subject:

> "There was no constitutional duty on the part of the Board to balance the races in teachers' employment and assignments. Teachers should be selected primarily on the basis of merit." (at 1393).

And, as held recently in **Clark v. Board of Education of Little Rock School District,** ... F.2d ... (C.A. 8th May 13, 1970), ". . . (T)he ultimate goal is the assignment of teachers solely on the basis of educationally significant factors, wherein race in and of itself is irrelevant."

In **Alexander v. Holmes County Board of Education,** 396 U.S. 19 (1969), this Court directed the lower federal courts in school cases to require school systems to,

"(B)egin immediately to operate as unitary school systems within which **no person is to be effectively excluded from any school because of race or color.**" (emphasis supplied)

The basic position underlying **Brown I** was that racial classifications could no longer be made, and that persons could not be dealt with by governments on a racial basis. This is entirely consistent with the rationale of the cases referred to above that reject the notion of assigning faculty on a racial basis. Obviously assigning faculty on a 60/40 ratio, as in the instant case, is assignment on a racial basis.

The judicial rejection of classification based upon race, distinctions based upon race and racial quotas, is not confined to public school desegregation cases, but is woven throughout the fabric of the law.

In **Loving v. Virginia**, 388 U.S. 1 (1967), a state miscegenation statute was declared void under the 14th Amendment on the reasoning that the statutes,

". . . (R)est solely upon distinctions drawn according to race." (p. 11)

In **McLaughlin v. Florida**, 349 U.S. 184 (1964), in striking down a Florida statute making it illegal for a Negro man and white woman to cohabit together, the Court held:

"But we deal here with a classification based upon the race of the participants, which must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classifications 'constitutionally suspect,' Bolling v. Sharpe, 347 U.S. 498, 499, 98 L.Ed. 884, 886, 74 S.Ct. 693; and subject to the 'most rigid scrutiny,' Korematsu v. United

States, 323 U.S. 214, 216, 89 L.ed. 194, 198, 65 S. Ct. 193; and 'in most circumstances irrelevant' to any constitutionally acceptable legislative purpose, Hirabayashi v. United States, 320 U.S. 81, 100, 87 L.Ed. 1774, 1786, 63 S. Ct. 1375. Thus it is that racial classifications have been held invalid in a variety of contexts. See, e.g., Virginia Board of Elections v. Hamm, 379 U.S. 19, 13 L.Ed. 2d 91, 85 S. Ct. 157 (designation of race in voting and property records); Anderson v. Martin, 375 U.S. 299, 11 L.Ed. 2d 430, 84 S.Ct. 454 (designation of race on nomination papers and ballots); Watson v. City of Memphis, 373 U.S. 526, 10 L.Ed. 529, 83 St. Ct. 1314 (segregation in public parks and playgrounds); Brown v. Board of Education, 349 U.S. 294, 99 L.Ed. 1083, 75 S.Ct. 753 (segregation in public schools)."

In the jury discrimination cases, it has been held that "A defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tries him nor on the venire or jury roll from which petit jurors are drawn." **Swain v. Alabama,** 380 U.S. 202, 208 (1965).

Similarly, a deliberate effort to limit the number of jurors because of racial considerations is unconstitutional. In **Cassell v. Texas,** 339 U.S. 282, 286-7 (1950), it was held:

> "We have recently written why proportional representation of races on a jury is not a constitutional requisite. Succinctly stated, our reason was that the Constitution requires only a fair jury selected without regard to race. Obviously the number of races and nationalities appearing in the ancestry of our citizens would make it impossible to meet a requirement of proportional representation. Similarly, since there can be no exclusion of Negroes as a race and no dis-

> crimination because of color, proportional limitation is not permissible." (p. 286)

On the other hand in **Collins v. Walker**, 329 F.2d 100 (C.A. 5th 1964), an indictment against a Negro was held unconstitutional where it had been returned by a specially empaneled grand jury upon which 6 Negroes were deliberately included, the Court declaring:

> "A Negro is entitled to the equal protection of the laws, no less and no more. He stands equal before the law, and is viewed by the law as a person, not as a Negro. An accused cannot demand a mixed grand jury, some of which shall be of his same race. What an accused is entitled to demand under the Constitution 'is that in organizing the grand jury there shall be no discrimination against him because of his race or color.' "

In other words, a person may not be **included** or excluded solely because he is a negro or because he is white. The requirement is that the system be designed without regard to race, and once the system is so designed, the fortuitous results that arise thereunder in any given instance give rise to no legitimate cause for complaint just because one race is not represented or is over-represented thereon.

Racial quotas uniformly have been held invalid. **Wright v. Rockefeller**, 211 F. Supp. 460 (D.C. N.Y. 1963), aff'd. 376 U.S. 52 (1964); **Progress Development Corp. v. Mitchell**, 182 F. Supp. 681 (D.C. Ill. 1960), rev'd. in part 286 F. 2d 227 (C.A. 7th 1961); **Banks v. Housing Authority**, 120 Cal. App. 2d 1, 260 P.2d 668 (1953), cert. den. 347 U.S. 974 (1954); **Taylor v. Leonard**, 30 N. J. Super. 116, 103 A.2d 632 (1954). "The law does not require a maximum of racial mixing or striking a racial balance accurately reflecting the racial composition of the community or the school population." **United States v. Jefferson County Board of Education**, supra, 372 F.2d at 847.

In the context of racial quotas in public housing it was stated of such a requirement in **Taylor v. Leonard**, 30 N.J. Super. 116, 103 A.2d 632 (1954):

> ". . . it is also a violation of section 1 of the Fourteenth Amendment of the Constitution of the United States.
> It is immaterial that the quota actually used bears some relation to the percentage of negro population in the particular municipality.
> The evil of a quota system is that it assumes that Negroes are different from other citizens and should be treated differently. Stated another way, the alleged purpose of a quota system is to prevent Negroes from getting more than their share of the available housing units. However, this takes for granted that Negroes are only entitled to the enjoyment of civil rights on a quota basis."

Another trouble with quotas and the exclusions they necessarily entail was pointed out in **Traux v. Raich**, 239 U.S. 33 (1915). In holding quotas respecting alien employment rights unconstitutional under the Fourteenth Amendment, the Court observed:

> "If the restriction to twenty percent now imposed is maintainable the State undoubtedly has the power if it sees fit to make the percentage less" (pp. 42-43).

The existence of racial quotas would presumably require **constant quota readjustments** as the racial composition of the body upon which the quotas are based changes. The best way to avoid the problem is obviously to avoid its beginnings. See **West Virginia State Board of Education v. Barnette**, 319 U.S. 624, (1942).

Manifestations of Congressional understanding of what the Constitution requires does not comport with what the

Fifth Circuit Court of Appeals has held in **Singleton**, supra, nor in the instant case, for in section 703 (a) (2) of the Civil Rights Act of 1964, it was provided that:

> "It shall be an unlawful employment practice for an employer—
>
> • • • • •
>
> "(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." **42 USCA 2000e- 2 (a)**.

Section 703 (j) of the same title declares:

> "Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area or in the available work force in any community, State, section, or other area." **42 USCA 2000e-2(j)**.

Granted that these statutes by their own terms do not apply to state employment, they certainly represent an authoritative Congressional declaration of what it feels

to be required by the Constitution, which by analogy is referrable to Section 5 of the Fourteenth Amendment.

The Elementary and Secondary Education Act of 1965, as amended, declares:

> "In the administration of this chapter no department, agency, officer or employee of the United States, shall exercise any direction, supervision or control over the personnel, curriculum or program of instruction of any school or school system, or any local or state educational agency **or require the assignment or transportation of students or teachers in order to overcome racial imbalance.**" (emphasis supplied)

Another inherent problem, either beyond the comprehension of courts requiring racial balance of faculties, or if comprehended, then ignored, is the fact that no correlation whatsoever is apt to exist between the system-wide racial composition of faculty and the black-white ratio of French teachers, science teachers, math teachers, or teachers of any other particular field or qualification.

In the words of **Clark**, supra,

> ". . . (T)he ultimate goal is the assignment of teachers solely on the basis of educationally significant factors, wherein race in and of itself is irrelevant."

With respect, it is the position of this respondent that the assignment of faculty in this school system on a racial ratio basis, as required by the Orders, Opinions, judgments and mandates of the Court of Appeals and the District Court, is not required by the Constitution, and is indeed unconstitutional.

III

Does the Constitution of the United States Require That the Public School Systems of the United States Assign the Students of the Systems to the Schools of the Systems in Such a Manner as to Achieve a Racial Balance of Students or Some Arbitrary Mathematical Ratio of Black and White Students in the Schools of the Systems?

Does the Mere Existence of a School With a Student Body Made Up of Students All of One Race, in a Public School System That Is Otherwise Completely Integrated and Unitary, Render the School System Constitutionally Deficient?

Does the Existence of Two (2) Schools That Have All Black Student Bodies and Five (5) Schools That Have All White Student Bodies, in a School System of Eighty-Three (83) Schools That Is Otherwise Completely Integrated and unitary, Render the School System Constitutionally Deficient?

It is the position of Respondent that the Constitution not only does not require a racial balance of students in the schools of the system, but that a plan of student assignment, assigning students to schools in pursuit of such balance would be constitutionally improper. It is Respondents further position that the mere existence in this school system or any other of a school or schools with uniracial student bodies, does not in and of itself render such school system constitutionally deficient.

The constitutional foundation of all public school desegregation is the Fourteenth Amendment to the United States Constitution, which provides that:

> "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

In **Brown I (Brown v. Board of Education of Topeka,** 347 U.S. 483 (1954)) this Court held that the Negro children for whom the action was brought, were "by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."

Brown I removed all state restraints, based upon race, upon admission to public schools. It also defined the constitutional rights of **all** children, both black and white, indicating that none of them can be denied access and use of public educational facilities on account of race, stating that the opportunity for education is:

> "a right which must be made available to all on equal terms."

But that is the limit of the decision, as it necessarily had to be, in view of the language of the Fourteenth Amendment. **Brown I** also articulated another important principle:

> "Public education is perhaps the most important single function of local government."

As stated in the brief for the United States in **Brown II** (Nos. 1, 2, 3, 4 and 5, October Term 1954, page 5):

> "These problems must be viewed in proper perspective. The starting point must be a recognition that we are dealing here with basic constitutional rights, and not merely those of a few children but of millions."
>
> "A prime consideration in dealing with the problems of desegregation must be that the systems of public education in the United States **should not be adversely affected.** Public education is one of the glories of the United States, and an indispensable source of its power. The richest resources of the United States are its citizens, and, as the Court has observed (347

U.S. at 493), education 'is the very foundation of good citizenship' ". (emphasis supplied)

Brown I was followed very shortly by **Brown II**. The direction in **Brown II**, to the District Courts upon remand, is notable. They were told to consider, as was pointed out to this Court by Petitioner's Counsel, Mr. Greenberg and Mr. Nabrit, in their brief in **Green** (No. 695, October term 1967, page 31):

> "problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools **on a non-racial basis**, and revision of local laws regulations which may be necessary in solving the foregoing problems (349 U.S. at 300-301)." (emphasis supplied)

In its brief in **Brown II** the United States seems to have held the same opinion. There it was stated:

> "The Constitution prohibits the maintenance of segregated school systems. It does not compel the adoption of any specific type of nonsegregated system. **The decisive inquiry is whether race or color has been entirely eliminated as a criterion in the admission of pupils to public schools.** The essence of the Court's decision in these cases is that there be no governmental action which enforces or supports school segregation. In passing upon the acceptability of proposed programs, the criterion should be whether the defendants have sustained the burden of showing that their particular program will bring about the **total elimination of racial considerations in the admission of pupils to public schools** as rapidly as local conditions allow." (emphasis supplied)

And in **Brown I** Thurgood Marshall, Esq. now Mr. Justice Marshall, in response to a question from Mr. Justice Frankfurter stated:

> "I think, sir, that the decree would be entered which would enjoin the school officials from, one, enforcing the statute; two, from **segregating on the basis of race or color.** Then I think what ever district lines they draw, if it can be shown that those lines are drawn on the basis of race or color, then I think they would violate the injunction. **If the lines are drawn on a natural basis, without regard to race or color, then I think that nobody would have any complaint.**
>
> For example the colored child that is over here in this school would not be able to go to that school. But the only thing that would come down would be the decision that whatever rule you set in, **it shall not be on race,** either actually or by any other way. It would violate the injunction, in my opinion."

In the ten years following Brown there were a veritable host of cases commenting upon what Brown had decided and what it had not decided.

Briggs v. Elliott, 132 F.Supp. 776:

> "Having said this, it is important that we point out exactly what the Supreme Court has decided and what it has not decided in this case. It has not decided that the federal courts are to take over or regulate the public schools of the states. It has not decided that the states must mix persons of different races in the schools. . . . What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains. . . . The Constitution, in other words, does not require integration. It

merely forbids discrimination. . . . It merely forbids the use of governmental power to enforce segregation."

Avery v. Wichita Falls Independent School Dist., 241 F.2d 230.

"The Constitution as construed in the School Segregation Cases * * * forbids any state action requiring segregation of children in public schools solely on account of race; it does not, however, require actual integration of the races."

Borders v. Rippy, 247 F.2d 268.

"The equal protection and due process clauses of the fourteenth amendment do not affirmatively command integration, but they do forbid any state action requiring segregation on account of their race or color of children in the public schools."

Holland v. Board of Public Education, 258 F.2d 730.

"The fourteenth Amendment does not speak in positive terms to command integration, but negatively, to prohibit governmentally enforced segregation."

Boson v. Rippy, 285 F.2d 43.

"Negro children have no constitutional right to the attendance of white children with them in the public schools. Their constitutional right to 'the equal protection of the laws' is the right to stand equal before the laws of the State; that is, to be treated simply as individuals without regard to race or color."

Cohen v. Public Housing Administration, 257 F.2d 73

"Neither the Fifth nor the Fourteenth Amendment operates positively to command integration of the races but only negatively to forbid governmentally enforced segregation."

Evers v. Jackson Municipal Separate School District, 328 F.2d 408

> "This is not to say that the Fourteenth Amendment commands integration of the races in the schools, or that voluntary segregation is not legally permissible . . . The Supreme Court did not hold otherwise in Brown v. Board of Education, 1954, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873. Its holding was that enforced racial segregation in the public schools is a denial of the equal protection of the laws enjoined by the Fourteenth Amendment. Cooper v. Aaron, 1958, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed. 2d 5."

In 1958, in the Little Rock School case, **Cooper v. Aaron**, 358 U.S. 1 (1958), this Court held that:

> "(T)he constitutional rights of **children** not to be discriminated against in school admission on grounds of race or color declared by this Court in the Brown case can neither be nullified openly and directly by state legislators or state executive or judicial officers . . ."

It is perhaps notable that this Court did not say black children, or white children, but **children.**

In **Rogers v. Paul**, 382 U.S. 198 (1965), this Court held that a school desegregation plan under which children were assigned to school on the basis of race was constitutionally impermissible.

The Fifth Circuit departed from this well established doctrine in **Jefferson (United States v. Jefferson County Board of Education**, 372 F.2d 836). Even there the dissent was strong. In his dissenting opinion Judge Bell said:

> "Then there is the matter of personal liberty. Under our system of government, it is not to be restricted except where necessary, in balance, to give others

> their liberty, and to attain order so that all may enjoy liberty. History records that sumptuary laws have been largely unobserved because they failed to recognize or were needlessly restrictive of personal liberty . . . . They (the majority opinion) **cast a long shadow over personal liberty as it embraces freedom of association and a free society. They do little for the cause of education.** (Emphasis supplied.)

And in his dissent Judge Gewin stated:

> ". . . There must be a mixing of the races according to majority philosophy even if such mixing can only be achieved under the lash of compulsion. . . . Accordingly, **while professing to vouchsafe freedom and liberty to Negro children, they have destroyed the freedom and liberty of all students, Negro and white alike.** There must be a mixing of the races, or integration at all costs, or the plan does not work according to the opinion. Such has not been and is not now the spirit or the letter of the law. . . . When our concepts as to proportions and percentages are imposed on school systems, notwithstanding free choices actually made, **we have destroyed freedom and liberty by judicial fiat; and even worse, we have done so in the very name of that liberty and freedom we so avidly . . . embrace.**" (Emphasis added.)

Notwithstanding the Fifth Circuit's departure, the other circuits remained fast, as indicated by the following cases: Fourth Circuit (Bradley v. School Board of City of Richmond, 382 U. S. 103; the Sixth Circuit (Monroe v. Board of Commissioners of City of Jackson, 380 F.2d 955 (1967); the First Circuit (Springfield School Committee v. Barksdale, 348 F.2d 261 (1965); the Seventh Circuit (Bell v. School City of Gary, 324 F.2d 209 (1963), cert. den., 377 U.S. 924); the Eighth Circuit (Clark v. Board of Education of Little Rock School District, 369

F.2d 661 (1966), reh. den., 374 F.2d 569) and the Tenth Circuit (Downs v. Board of Education of Kansas City, 336 F.2d 988 (1964), cert. den., 380 U.S. 914).

This Court in **Green** (**Green v. County School Board of New Kent County, Virginia**, 391 U.S. 430) took somewhat of a partial departure, while dealing in the context of a small, rural, two school system where freedom of choice had been ineffective.

Even there Petitioner's Counsel, Mr. Greenberg and Mr. Nabrit, who are also counsel for Petitioners here, said in their brief (page 14):

> "Prior to the relatively recent controversy concerning segregation in large urban systems, assignment by geographic attendance zones was viewed as the soundest method of pupil assignment. This was not without good reason; for placing children in the school nearest their home would often eliminate the need for transportation, encourage the use of schools as community centers and generally facilitate planning for expanding school population."

Subsequent to **Green** the original doctrine from **Brown I** has been reasserted, by the Sixth Circuit:

> "It is submitted that the Constitution imposes no such duty. Appellants are not the only children who have constitutional rights. There are Negro, as well as white, children who may not want to be bussed away from the school districts of their residences, and they have just as much right to attend school in the area where they live. They ought not to be forced against their will to travel out of their neighborhoods in order to mix the races." **Deal v. Cincinnati Board of Education**, 419 F.2d 1387 (C.A. 6th 1969).

This is reminiscent of the language of Mr. Justice Frankfurter in **Cooper v. Aaron**, 358 U.S. 1.

> "The use of force to further obedience to law is in any event the last resort, and one not congenial to the spirit of our Nation."

The criterion of race in the assignment of public school students simply is improper under our governmental system.

> "The genius of the American political tradition, in its best sense, in relation to race is that it dictates that racial criteria are not legitimate in the operation of governmental facilities and should be rigorously eschewed. To bring racial criteria in by the front door, so to speak, even before throwing them out the back, represents, in my opinion, no real gain for the body politic and has potentially dangerous implications for the future."*67

The Petitioners' position also endangers the fundamental aim of the public school system. Clearly there is no redeeming value in integration compelled at the expense of education. The following statement gives some perspective to the problem:

> "(T)he purpose of schools is education and . . . no child is being served if education is being made impossible. School authorities must make clear when they believe that pupils are being used as pawns in the struggles of adults. The question to be asked about all proposals is whether they will contribute to the education of the pupils involved, not whether they will contribute to other goals, even desegregation."*68

Notwithstanding **Green, Deal** is entirely justified in view of this Court's later Opinion in **Alexander** where this court

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*67 Gordon, Assimilation in American Life: The Role of Race, Religion and National Origins, p. 250 (1964).

*68 DeFacto Segregation, Educational Policies Commission of the NEA and the American Association of School Administrators, NEA Journal, p. 36 (October 1965).

again restated the constitutional mandate originally set forth in Brown in terms of a unitary school system,

> "within which no person is to be effectively excluded from any school because of race or color."

Brown I and II, Green and **Alexander**, and essentially everything in between, excepting **Jefferson** and the line of Fifth Circuit cases that followed the **Jefferson** doctrine (but for a more current expression by the Fifth Circuit see **Ellis v. Board of Public Instruction of Orange County**, 423 F.2d 203) have an undeniably common view of the constitutional obligation of school systems. It is that under our constitution education is a right which must be made available to all on an equal basis; that students both black and white must be assigned to schools on a non-racial basis; that school systems must be operated on a unitary basis within the framework of which no person is totally compelled to attend any school because of race or color, nor effectively excluded from any school because of race or color.

If our position in this regard is not sound, then the Court's have come full-cycle from **Brown**: There, racial classifications were prohibited by the Constitution; now, they are held to be demanded by the same Constitution. If the rule is to be that racial classifications are illegal except those looked upon with favor by the Court, then it is no longer the Constitution which is the Supreme law of the land, but the transient views of the individuals who happen to occupy judicial office at any particular time.

IV

Under the Constitution of the United States, Do White Public School Students Have the Same Right or an Equal Right as Do Black Public School Students, to the Benefit and Protection of the Constitution and of the Laws of the United States; Specifically the Equal Protection Clause of the Fourteenth Amendment, and the Civil Rights Act of 1964. If They Do, Then Is It Not Constitutionally Sufficient That Public School Systems Assign Students to Schools on the Basis of Attendance Zones That Are Fairly Drawn to Normal Standards of Educational Soundness and Upon the Basis of Non-Racial Criteria, in Order to Produce as Nearly as Possible a System of Unitary Neighborhood Schools.

From the very beginning of this litigation, this School Board and its professional staff have voiced their preference for and desire to maintain a system of neighborhood schools, because of their sincere and unbending belief that such a system is most beneficial for all children of the system, black and white. Beneficial not only from a purely educational standpoint, but also from the standpoint of the general support for the school system when children and parents identify themselves with the neighborhood school and its related programs—recreation, social events, scouting activities, and a multitude of other things. Destruction of this identification leads inevitably to just exactly the sort of system-wide unrest and chaotic atmosphere now prevalent in the Mobile County Public School System; and ultimately this leads to a total withdrawal of public confidence in and concern for the quality of the entire school system and public education in general. Some systems have already experienced this withdrawal of support.*[69]

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*[69] From the Amicus Curiae brief of the Chattanooga Board of Education in Swann (No. 281) we notice that the people of Chattanooga have three times voted down education bond issues totaling thirty six million dollars.

This school system is now feeling it. Others will soon experience it.

From time to time this School Board has yielded to public pressure to seek freedom of choice (after the Courts had initially injected the concept into the focus of public attention); and from time to time this Board has yielded to the mandate of the Court to employ a system of student assignment that it has known to depart from the neighborhood school concept, and to be educationally unsound, such as the plan of student assignment now in implementation for the 1970-71 school year. But throughout, the Board and its professional staff have held the conviction that neighborhood schools with students assigned on a non-racial basis, coupled with a majority to minority transfer provision, is not only educationally sound, but constitutionally sufficient.

The gist of Petitioners' argument is that a public school system is segregated as long as there remains any school which is not attended by both white and black children. This argument was rejected by the three judge court on the remand in **Brown v. Board of Education of Topeka**, 139 F. Supp. 468, 470 (d. Kan. 1955);

> "It was stressed at the hearing that such schools as Buchanan are all-colored schools and that in them there is no intermingling of colored and white children. Desegregation does not mean that there must be intermingling of the races in all school districts. It means only that they may not be prevented from intermingling or going to school together because of race or color."

The same point is made in **Downs v. Board of Education of Kansas City**, 336 F.2d 988, where the use of geographic attendance zones had resulted in some schools having an all white and some schools having an all black

enrollment. The appellants' argument that this result rendered the zone plan unconstitutional was rejected by the Court, (p. 998).

> "Appellants also contend that even though the Board may not be pursuing a policy of intentional segregation, there is still segregation in fact in the school system and under the principles of Brown v. Board of Education, supra, the Board has a positive and affirmative duty to eliminate segregation in fact as well as segregation by intention. While there seems to be authority to support that contention, the better rule is that although the Fourteenth Amendment prohibits segregation, it does not command integration of the races in the public schools and Negro children have no constitutional right to have white children attend school with them." (Footnote omitted) (Citations omitted) (Emphasis added)

At one time this seems also to have been Petitioners view:

> "moreover, the jury discrimination precedents may be recalled: Bias may be presumed from a consistently segregated result; a token number of Negroes may be legally equivalent to none. If, however, in education there were complete freedom of choice, or **geographic zoning**, or any other non-racial standard, and all Negroes still ended up in certain schools, there would seem to be no constitutional objection." (Greenberg, Race Relations and American Law, page 239) (1959) (emphasis supplied)
>
> "Prior to the relatively recent controversy segregation in large urban systems, assignment by geographic attendance zones was viewed as the soundest method of pupil assignment. This was not without good reason; for placing children in the school nearest their home would often eliminate the need for transporta-

tion, encourage the use of schools as community centers and generally facilitate planning for expanding school populations." (Brief for Petitioner in **Green**, No. 695, October term, 1967)

Deal v. Cincinnati Board of Education, 324 F.2d 209 (6th Cir. 1966) succinctly stated the case for neighborhood schools:

> "Appellants, however, pose the question of whether the neighborhood system of public placement, fairly administered without racial bias, comports with the requirements of equal opportunity if it nevertheless results in the creation of schools with predominantly or even exclusively Negro pupils. The neighborhood system is in wide use throughout the nation and has been for many years the basis of school administration. This is so because it is acknowledged to have several valuable aspects which are an aid to education, such as minimization of safety hazards to children in reaching school, economy of cost in reducing transportation needs, ease of pupil placement and administration through the use of neutral, easily determined standards, and better home-school communication."

Subsequently this was reaffirmed by the Sixth Circuit in **Deal v. Cincinnati Board of Education**, supra. (1969); and notwithstanding **Jefferson**, the Fifth Circuit has also recently approved the neighborhood school concept, in **Ellis** supra, and approximately twenty other cases within the past nine months.

The neighborhood school concept also has the endorsement of the Executive Branch of the Government. In his policy statement of March 24, 1970, entitled **SCHOOL DESEGREGATION: A Free and Open Society** (116 Cong. Rec. S4351, Daily Ed., March 24, 1970), the President of

the United States addressed himself at length and in depth to the important role that the neighborhood school plays in the education of our public school children. He said in part:

> "The neighborhood school will be deemed the most appropriate base for such a (unitary) system."
> "Transportation of pupils beyond normal geographical school zones for the purpose of achieving racial balance will not be required."

The decisions by this Court in **Brown I** and **II**, **Cooper v. Aaron**, **Rogers v. Paul**, **Green** and **Alexander v. Holmes** are all consistent with the neighborhood school concept.

Brown forbade the use of racial criteria in the assignment of students. **Cooper v. Aaron** and **Rogers v. Paul** were essentially of the same import. **Green** restated in a different context the basic proposition that school boards are required by **Brown II**,

> "to effectuate a transition to a racially nondiscriminatory school system."

Alexander again restated the prohibition against the exclusion of students from schools on the basis of racial criteria, this time in the context of a "unitary" school system. The **Alexander** definition does not prohibit all exclusion—only invidious ones based on race or color. There are any number of reasons why a child can fairly be required to attend one school instead of another; capacity, distance, cost, disruptions, location of residence, age, safety, administrative problems, educational considerations and a host of other factors that have absolutely nothing to do with his race or color. All consistent with the neighborhood school concept.

Deal v. Cincinnati Board of Education, supra, at 1391-92 (6th Circ. 1969) addressed itself to this matter:

"It is the contention of appellants that the Board owed them a duty to bus white and Negro children away from the districts of their residences in order that the racial complexion would be balanced in each of the many public schools in Cincinnati. It is submitted that the Constitution imposes no such duty. **Appellants are not the only children who have constitutional rights.** There are Negro, as well as white, children who may not want to be bussed away from the school districts of their residences, and they have just as much right to attend school in the area where they live. They ought not to be forced against their will to travel out of their neighborhoods in order to mix the races." (Emphasis added.)

The District Judge in **Ross v. Eckels, Houston Independent School District,** supra, raised this question.

"Our hypothetical student well might say to the Superintendent of Instruction, 'You are excluding me from School A, two blocks from my home, because I am black, and for no other reason. How can you do this when the Supreme Court of the United States in its latest pronouncement on the subject imposes on you the duty to operate as (a) unitary school system **within which no person is to be effectively excluded from any school because of race or color?**' I would be interested to know how this question would be answered." (Emphasis added)

The only view opposite to this is the one stated rather cryptically by one three judge panel of the Fifth Circuit in **United States v. Indianaola Municipal Separate School District,** 410 F.2d 626:

". . . we are firm that a point has been reached in the process of school desegregation where it is not the spirit but the bodies that count."

Surely this cannot be! How can this be squared with **Brown I** which stated that education is:

> "a right which must be made available to all on equal terms" . . . and . . . "Public Education is perhaps the most important single function of local government."

Quality Public Education as an American Institution and the philosophy of Petitioners accurately reflected by the quotation above from **United States v. Indianola** are on a deadly collision course. Only one can survive.

The desire to have physically demonstrable evidence of the fact that a change has been made in a school has led to an emphasis upon the number of black students physically present within any educational setting. This is a part of the concept of the "numbers game" which is referred to frequently in writings relating to school desegregation. The number of black children physically present has come to be equated with the attainment of the ultimate objective. Judges and others have been searching for rules of conduct, a formula, or other yardsticks that could be applied in any given situation to determine whether or not a school district had met the minimum standards of the Fourteenth Amendment as interpreted by **Brown I** and **II**. The Courts have been placed under intense pressure with regard to desegregation, and in certain circuits as a result have had an intense motivation to evolve and fabricate orders and procedures that can be easily understood, and that can be evaluated by non-academic personnel. This has caused the remedy to be reflected in the "numbers game", in statistical information, with no regard for the educational environment or the classroom atmosphere essential to educational opportunity.

What impact will there be upon black pupils if they are aware of the fact that the only reason why they are sitting alongside white students is because of the presence of a governmental force in some form requiring them to remain where they are? If desegregation is only possible under these circumstances have we not allowed an obsession with the numbers game to steer us away from the basic constitutional right that got us here in the first place?

What degree of detriment to a public school system is acceptable in order to achieve mathematical racial balance? Are we really to the point where it is not the spirit, but the bodies that count?

Presumably, it is the common goal of all to provide the best possible education for each and every child within our public school systems. Are there really no constitutionally permissible alternatives to the present juggling about of pupils and teachers (without any apparent regard for their highly individualized educational needs, goals and desires) simply to achieve a well-blended color scheme? Is this "equal educational opportunity"?

Must all opportunity for innovation and improvement in public education be sacrificed to ever higher levels of racial balance? Are the fundamental rights of parenthood of which this Court so eloquently spoke in **Pierce v. Society of Sisters**, 268 U.S. 510, 534-35 (1925), and **Meyer v. Nebraska**, 262 U.S. 390, 399-400 (1923), to be discarded in obedience to the notion that those who govern care more for children than those who gave them life? We think it a singular as well as tragic commentary on our times that these questions of basic human liberty need even be asked.

We agree with the President, Mr. Justice Marshall and Mr. Greenberg, that the assignment of students to schools on a non-racial basis is constitutionally sufficient, that the transportation of pupils beyond normal geographic school zones for the purpose of achieving racial balance should not be required and that the neighborhood school is the most appropriate base for the unitary school system.

CONCLUSION

Public education is in deep trouble, not only in the south, but in the country as a whole. With respect, the lion's share of the problem emanates from the fact that the Federal Courts have literally assumed the responsibility of operating the local school systems, a task for which they are by nature, experience, temperament and ability, unbelievably ill-equipped.

Nor do those upon whom the courts have relied for assistance, the Justice Department and HEW, bring any improvement to the situation.

Perhaps there is no better illustration of this Federal inability to run a local school system than is presented by this very case, where for all practical purposes, for the past four years, the local School Board has been nothing more than a powerless administrative extension of the Federal Courts.

Somewhere, somehow, we must return to a recognition of the simple fact that the vital, essential purpose of public education and public school systems, is **education** and not **integration.**

Many well-meaning people apparently believe that the solution to all of the racial ills of the country is to compel

people to associate. But this assumption has proven false. Compelling people to associate against their will does not lessen, but only exacerbates, racial tensions. However desirable the goal of inter-racial association may appear to some, we submit that it cannot be achieved by measures that violate the Constitution. Desirable ends do not justify unconstitutional means, whatever the urgency of the situation, and this proposition applies with just as much force to the federal courts and the executive department as it does to the lowest county or city official.

Even for those who find basis to disagree with this basic position, there still remains the further inscrutable fact that if **public education** is to survive it can no longer be used as the vehicle for this philosophy of association by compulsion. We say, if public education is to survive; perhaps to some this is not an important criteria!

The quest for racial balance on the one hand and quality education for all children black and white on the other, are on a deadly collision course. One will not survive their ultimate meeting. For those who demand racial balance, busing for the sake of busing, the vindication of one constitutional right at the expense of another, it is pertinent to inquire as to where their motivation may lie. Are they interested in quality education, or are they interested in revenge and retribution.

We respectfully urge this Court to approve as a general principle the constitutional validity of the neighborhood school concept, and the constitutional invalidity of the arbitrary assignment of public school students and teachers on the basis of a racial ratio or quota, or in pursuit of a racial balance.

We respectfully request that this case be remanded to the District Court for the formulation of a revised desegregation plan consistent with these principles.

Respectfully submitted

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Washington, D. C.

Student Transfer Policy

Upon written request of a parent or guardian, students may be granted transfer from the school in which they are enrolled to any school within their grade level.

1. Such transfers may be granted for any of the following reasons provided space is available and provided that such transfer does not require special transportation arrangements at additional cost to the School Board.

APPENDIX

   a. Transfers shall be granted to students requiring a course of study not offered at the school in which they are enrolled or for other sound educational reasons.

   b. Transfers shall be granted to students in case of extreme hardship or for other good cause determined to be similar in character.

   c. Transfers shall be granted to students attending a school in which his race is in the majority to a school where his race is in the minority with transportation provided by the School Board if desired.

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APPENDIX

STUDENT TRANSFER POLICY

Upon written request of a parent or guardian, students may be granted transfer from the school in which they are enrolled to any school which serves their grade level.

I. Such transfers may be granted for one of the following reasons provided space is available and provided that such transfer does not require special transportation arrangements by the School Board.

   A. Transfer shall be granted to students requiring a course of study not offered at the school in which they are enrolled or for other sound educational reasons.

   B. Transfers shall be granted to students in case of extreme hardship or for other good cause non-racial in character.

II. Transfers shall be granted to students attending a school in which his race is in the majority to a school where his race is in the minority with transportation provided by the School Board if desired.

APPENDIX I

PROJECTED ENROLLMENT DATA

UNDER ZONES LINES

HIGH SCHOOL

NAME OF SCHOOL	GRADE	U. S. DISTRICT COURT PLAN		FIFTH CIRCUIT PLAN		TOTAL UNDER DISTRICT COURT PLAN	PERMANENT CAPACITY
		WHITE	NEGRO	WHITE	NEGRO		
Rain	7-12	1143	112	1150	97	1255	868
Williamson	10-12	824	491	880	471	1315	1305
Murphy	10-12	1300	1027	1643	1761	2327	2813
Toulminville	10-12	247	420	9	740	667	609
Blount-Carver	9-12	1022	1693	854	1846	2715	2697
Vigor-Bienville	9-12	1000	1425	1134	1211	2425	2204
Shaw	9-12	1312	237	1250	240	1549	1015
Davidson	9-12	2201	80	2302	72	2281	1943

NAME OF SCHOOL	GRADE	U. S. DISTRICT COURT PLAN		FIFTH CIRCUIT PLAN		TOTAL UNDER DISTRICT COURT PLAN	PERMANENT CAPACITY
		WHITE	NEGRO	WHITE	NEGRO		
B. C. Rain	7-12	1143	112	1150	97	1255	868
Banes	6-9	770	220	1292	977	990	1148
Hall	6-9	336	910	1292	977	1246	1224
Dunbar	6-9	170	770	181	985	947	1064
Central	6-9	387	1164	468	1260	1551	1508
Washington	6-9	748	709	1170	1716	1457	1015
Phillips	6-9	417	695	1170	1716	1112	980
Trinity Gardens	6-8	320	540	380	690	861	868
Prichard	6-8	220	458	240	410	678	615
Mobile County Training	6-8	333	885	432	859	1218	1232
Clark	6-8	703	846	536	948	1549	1392
Scarborough	6-8	884	11	638	77	895	896
Millsdale	6-8	451	210	431	217	661	764
Azalea Road	7-8	996	38	1039	38	1034	986
Eight Mile *	1-8	549	110	280 *	66 *	659	598

* District Court plan grade structure is 1-8 and the Fifth Circuit's Plan grade structure is 1-6.

NAME OF SCHOOL	GRADE	U. S. DISTRICT COURT PLAN		FIFTH CIRCUIT PLAN		TOTAL UNDER DISTRICT COURT PLAN	PERMANENT CAPACITY
		WHITE	NEGRO	WHITE	NEGRO		
South Brookley	1-6	490	71	502	71	561	408
Williams	1-6	561	45	571	43	606	408
Morningside	1-5	672	0	631	0	672	544
Maryvale	1-5	402	257	441	117	659	544
Craighead	1-5	300	506	347	489	806	850
Council	1-5	40	427	4	391	467	544
Arlington	1-5	163	178	160	170	341	476
Caldwell	1-5	87	431	0	350	518	510
Leinkauf	1-5	118	393	273	165	511	442
Owens	1-5	2	1300	2	1414	1302	1428
Old Shell Road	1-5	492	7	332	295	499	476
Woodcock	1-5	255	0	424	167	255	570
Hertz	1-5	415	110	498	104	525	510
Fonville	1-5	37	787	0	1000	824	1088
Westlawn	1-5	384	0	532	0	384	510
Crichton	1-5	379	329	438	348	708	714
Stanton Road	1-5	5	826	6	900	831	1020
Frazier	1-5	0	1120	10	1022	1120	1156
Grant	1-5	30	850	15	1285	880	1122
Glendale	1-5	65	480	434	931	545	884
Palmer	1-5	235	435	434	931	670	568
Whitley	1-5	261	314	216	481	655	578
Robbins	1-5	0	775	638	855	775	850
Hamilton	1-5	630	15	638	855	645	646
Thomas	1-5	180	95	180	95	275	272
Whistler	1-5	181	205	181	205	386	510
Chickasaw	1-5	443	0	473	100	443	612
Eight Mile *	1-8	549	110	280	66 *	659	598
Indian Springs **	1-6	445	15	535	11	460	408
Orchard	1-5	714	161	754	113	875	816
Forest Hill	1-5	624	0	560	0	624	578
Will	1-5	534	299	657	175	833	816
Austin	1-5	488	10	396	22	498	408
Dickson	1-6	726	5	835	193	731	782
Fonde	1-6	773	13	679	11	786	850
Shepard	1-6	415	29	409	29	444	544
Dodge	1-6	503	50	675	65	553	816
Gorgas	C L O S E D						

* District Court plan grade structure is 1-8 and the Fifth Circuit plan is grade structure 1-6.

** Fifth Circuit plan made no provision for 6th grade at Indian Springs.